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## Communication and Competence for Self-Representation

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## ARTICLES

### COMMUNICATION AND COMPETENCE FOR SELF-REPRESENTATION

*E. Lea Johnston\**

*In Indiana v. Edwards, the U.S. Supreme Court held that states may impose a higher competency standard for self-representation than to stand trial in criminal cases. While the Court articulated a number of interests relevant to representational competence, it left to states the difficult task of formulating an actual competence standard. This Article offers the first examination and assessment of the constitutionality of state standards post-Edwards. It reveals that seven states have endorsed a representational competence standard with a communication component. Additionally, twenty states have embraced vague, capacious standards that could consider communication skills. In applying these standards, states have denied a defendant's self-representation because of his stuttering, strong foreign accent, and low level of education, even when the defendant has intact decision-making abilities.*

*However, the extent to which the Sixth Amendment permits denial of self-representation on the basis of inadequate communication skills is dubious. Edwards indicates the relevance of expressive abilities to representational competence, yet Farett v. California warns that trial courts should not expect strong advocacy skills from pro se litigants. Moreover, McKaskle v. Wiggins construes self-representation as a bundle of distinct rights of*

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\* Professor of Law, University of Florida, Levin College of Law. I wish to thank Laura Appelman, Richard Bonnie, Cara Drinan, Andrew Ferguson, Clifford Fishman, Darren Hutchinson, Jerold Israel, Kevin Lapp, Michael Mannheimer, Dan Markel, Ion Meyn, Mark Noferi, Anna Roberts, Sharon Rush, Christopher Slobogin, Michael Seigel, and Seth Stoughten for their valuable comments and suggestions. I also appreciate feedback from participants at the American Psychology-Law Society 2016 annual conference, the CrimFest 2014 Conference at Rutgers School of Law in Newark, and the American Bar Association Criminal Justice Section's Seventh Annual Fall Institute. I am grateful for the summer grant provided by the Levin College of Law. Finally, I thank Robert Baumann, Stephen Carr, Jerry Edwards, Charles Garabedian, Daniel Greene, Chelsea Koester, Michael Kouskoutis, Anny Martin, Patrick Todd, Lazaro Vazquez, and Todd Venie for their outstanding research and editorial assistance.

*control and performance, suggesting that a court should permit a decisionally competent defendant to control his case even if he requires assistance to perform it. This Article reconciles these three cases and proposes a normative theory to balance the competing concerns of autonomy, fairness, and accuracy that are implicated when defendants proceed pro se. It identifies four categories of communication impairments of varying constitutional significance and subjects these categories to this normative theory to discern the extent to which they should constitute cognizable grounds for representational incompetence. This analysis reveals that existing state competency standards are constitutionally suspect. This Article suggests substantive revisions to state standards and offers a model, two-pronged competence standard for self-representation that would withstand constitutional scrutiny and ensure that a defendant has the necessary capacities both to control and to conduct his defense.*

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## INTRODUCTION

In 2008, the U.S. Supreme Court held in *Indiana v. Edwards*<sup>1</sup> that the Sixth and Fourteenth Amendments permit trial courts to impose a higher competency standard for self-representation than that required to stand trial.<sup>2</sup> The issue presented in that case was whether a trial court must permit a severely mentally ill defendant to represent himself at trial when he was found competent to stand trial and to have effected a valid waiver of counsel.<sup>3</sup> In addressing this narrow question, the Court did not need to specify which components of a representational competence standard would survive constitutional scrutiny.<sup>4</sup> However, a close reading of *Edwards* provides some clues. The opinion demonstrates the important relationship between a defendant's severe mental illness and his cognitive powers of understanding, reasoning, and appreciation.<sup>5</sup> Other portions indicate the relevance of a defendant's expressive abilities and functional abilities to perform discrete trial tasks.<sup>6</sup> The opinion also manifests concern for a number of values implicated when a gray-area defendant represents himself, including the defendant's autonomy, the reliability of the conviction and sentence, and the actual and apparent fairness of the adjudication.<sup>7</sup>

However, *Edwards* left unclear how states should actually weigh these competing concerns and which disabilities might justify denying the right

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1. 554 U.S. 164 (2008).

2. In this Article, the terms "competence" and "competency" are used interchangeably. These terms refer to the legal judgment of which functional abilities are necessary to trigger the application of various legal rules. This Article also uses "abilities" and "capacities" interchangeably.

3. *Id.* at 169; *see also id.* at 182 (Scalia, J., dissenting).

4. The term "representational competence" refers to those abilities that a defendant should possess in order to represent himself at trial. E. Lea Johnston, *Representational Competence: Defining the Limits of the Right to Self-Representation at Trial*, 86 NOTRE DAME L. REV. 523, 528 n.30 (2011). Scholars have proposed a range of representational competence standards of varying degrees of specificity. *See id.* at 595; *see also* Alan R. Felthous, *Competency to Waive Counsel: A Step Beyond Competency to Stand Trial*, 7 J. PSYCHIATRY & L. 471, 476 (1979); Jason R. Marks, *State Competence Standards for Self-Representation in a Criminal Trial: Opportunity and Danger for State Courts After Indiana v. Edwards*, 44 U.S.F. L. REV. 825, 847–48 (2010); Peter R. Silten & Richard Tullis, *Mental Competency in Criminal Proceedings*, 28 HASTINGS L.J. 1053, 1068 (1977); Christopher Slobogin, *Mental Illness and Self-Representation: Faretta, Godinez and Edwards*, 7 OHIO ST. J. CRIM. L. 391, 410 (2009).

5. *See infra* notes 28–30, 237–60 and accompanying text.

6. *See infra* notes 31–33 and accompanying text.

7. *See Edwards*, 554 U.S. at 174–77. The *Edwards* case defines a "gray-area defendant" as one who is competent to stand trial but, because of a severe mental illness, may be incompetent to represent himself at trial. *See id.* at 172–73 (stating that relevant defendants have "a mental condition that falls in a gray area between *Dusky's* minimal constitutional requirement that measures a defendant's ability to stand trial and a somewhat higher standard that measures mental fitness for another legal purpose").

of self-representation. As a result, jurisdictions have adopted differing and often vague standards for representational competence.<sup>8</sup> This tangle of ambiguous and contradictory standards is troubling because state thresholds for the exercise of federal constitutional rights generally should not vary. Moreover, the problem of representational competence is not uncommon; it is formally raised in scores of cases that proceed to trial and is likely an explicit or implicit issue in thousands of cases that are resolved through guilty pleas or dismissals.

This Article offers the first comprehensive and critical examination of how states have responded to *Edwards*.<sup>9</sup> This analysis shows that, as of May 2015, thirty-one states have accepted *Edwards*'s invitation to adopt a heightened representational competence standard.<sup>10</sup> Of these, twenty states' standards parrot the vague language in *Edwards* and generally permit trial courts to deny self-representation when defendants "are not competent to conduct trial proceedings by themselves."<sup>11</sup> Four states have articulated more detailed standards that involve only decisional abilities.<sup>12</sup> In contrast, seven states—Alaska, California, Connecticut, Indiana, Iowa, Wisconsin, and Wyoming—have embraced competence standards that assess a defendant's ability to communicate with the trier of fact or present a meaningful defense.<sup>13</sup> Cases reveal that, particularly when incompetence does not hinge on severe mental illness, such standards can operate to deprive fully rational, autonomous defendants of the right to control their defense.<sup>14</sup>

*Edwards* expressly sidestepped the question of whether a representational competence standard with a "coherent communication" requirement would pass constitutional muster.<sup>15</sup> This Article seeks to resolve that question, now urgent in light of the use of similar standards in states with nearly sixty million people.<sup>16</sup> An examination of case law reveals that state courts' findings of representational incompetence may respond to a variety of impairments, including disordered speech, an inability to communicate in a timely fashion, stuttering, strong foreign accent, low level of educational attainment, or tendency to ramble.<sup>17</sup> These categories of impairment differ in the extent to which they reflect cognitive dysfunction, stem from a

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8. See *infra* Part I.A–C.

9. See Marks, *supra* note 4, at 835–41 (outlining the choices available to states after *Edwards* and detailing the few standards adopted as of 2010).

10. See *infra* Part I.

11. See *infra* note 44; *Edwards*, 554 U.S. at 178.

12. See *infra* notes 55–59.

13. See *infra* Part I.C.

14. See *infra* Part I.D.1–2.

15. See *Edwards*, 554 U.S. at 178 (voicing uncertainty "as to how that particular standard would work in practice").

16. See *State and County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/index.html> (last updated May 28, 2015) (providing links to the 2014 population estimates for Alaska, California, Connecticut, Indiana, Iowa, Wisconsin, and Wyoming) [<https://perma.cc/95EF-JLKC>].

17. See *infra* Part I.B.

mental illness, and are susceptible to amelioration by hybrid counsel.<sup>18</sup> Because competence is ultimately a legal and moral judgment,<sup>19</sup> any determination of the components of a competency standard must derive from a weighing of the values animating and implicated by self-representation.

Drawing on Supreme Court case law, this Article articulates and defends a normative conception of representational competence that balances the competing interests of autonomy, accuracy, and fairness.<sup>20</sup> It then engages in a fine-grained analysis of the constellation of Supreme Court cases establishing and limiting the right to self-representation to discern guidance for the import of communication to representational competence.<sup>21</sup> One notable insight, largely overlooked by commentators to date, is the Court's construal of self-representation as a bundle of distinct rights of control and performance.<sup>22</sup> Impairments affecting defendants' communicative abilities largely implicate the latter right, but not the former. This distinction holds profound implications for the nature of representational competence and possible responsibilities of hybrid counsel.

This Article applies these insights to four categories of communication impairments—those involving disordered speech, an inability to be understood by courtroom actors, an inability to communicate in a timely fashion, and suboptimal advocacy—to identify which impairments warrant a denial of the rights to control or to conduct one's defense.<sup>23</sup> These conclusions reveal the likely unconstitutionality of certain state standards and provide grist for suggested modifications to others. This Article concludes with a model representational competence standard that accords sufficient respect for a defendant's autonomy, avoids grave threats to accuracy and fairness, and comports with Sixth Amendment jurisprudence.<sup>24</sup>

Part I of this Article discusses the results of the fifty-state survey on states' approaches to representational competence. It provides a detailed examination of the seven states with communication-based representational competence standards and generates a taxonomy of four categories of communication impairments that may hold differing constitutional significance. Part II articulates a normative lens that balances competing values of autonomy, accuracy, and fairness and closely examines Supreme Court case law on the proper relationship between communicative abilities

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18. See *infra* Part III.B–E. For a working definition of hybrid counsel, see Joseph A. Colquitt, *Hybrid Representation: Standing the Two-Sided Coin on Its Edge*, 38 WAKE FOREST L. REV. 55, 56–57 (2003) (“[Hybrid representation] consists of the concurrent representation by counsel for an accused and the accused appearing pro se. In other words, in a case of hybrid representation, the accused and an attorney essentially function as ‘co-counsel.’”).

19. See *infra* notes 147–48 and accompanying text.

20. See *infra* Part II.A.

21. See *infra* Part II.B.

22. See *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984).

23. See *infra* Part III.

24. See *infra* notes 336–52 and accompanying text.

and representational competence. Part III then applies this normative lens and understanding to the four categories of communication impairments, discerns which kinds of impairments should constitute grounds for denial of the right to control or to conduct one's defense, and draws conclusions for state representational competence standards. This Article concludes by offering a model approach to representational competence.

#### I. A PATCHWORK OF REPRESENTATIONAL COMPETENCE STANDARDS AFTER *EDWARDS*

In *Edwards*, the U.S. Supreme Court held that the Constitution permits states to deny self-representation to defendants competent enough to stand trial but whose severe mental illnesses render them incompetent to proceed *pro se*.<sup>25</sup> The Court recognized:

In certain instances an individual may well be able to satisfy *Dusky*'s mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel.<sup>26</sup>

While the Court declined to adopt a particular representational competence standard, *Edwards* suggests that certain abilities may be relevant to this inquiry. First, in focusing on the "mental condition"<sup>27</sup> or "mental fitness"<sup>28</sup> of the *pro se* defendant, the Court appeared to care centrally about his *adjudicative competence*, or powers of understanding, reasoning, and appreciation.<sup>29</sup> Regarding defendant Edwards, the Court stressed his disordered and delusional thinking, which were manifestations of his schizophrenia.<sup>30</sup> Second, the Court highlighted the importance of a defendant's expressive ability and drew attention to Edwards's rambling and nonsensical motions, which revealed his disordered thinking.<sup>31</sup> Third, the Court listed the following conditions as impeding self-representation: "disorganized thinking, deficits in sustaining attention and concentration[,] . . . anxiety, and other common symptoms of severe mental illnesses."<sup>32</sup> Finally, the Court observed that a *pro se* defendant will likely need to perform a range of common trial tasks, including "organization of

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25. *Indiana v. Edwards*, 554 U.S. 164, 178 (2008).

26. *Id.* at 175–76. The competence to stand trial standard was established in *Dusky v. United States*, 362 U.S. 402 (1960), which held that, to stand trial, a defendant must possess "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." *Id.*

27. *See Edwards*, 554 U.S. at 172.

28. *See id.* The Court also used the terms "mental capacity," *see id.* at 174–77, and "mental competency," *see id.* at 170–72, 174–75.

29. *See id.* at 176 (quoting N. POYTHRESS ET AL., *ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES* 103 (Kluwer Academic 2002)); *see also infra* notes 241–51 and accompanying text (describing the concept of adjudicative competence in more detail).

30. *See Edwards*, 554 U.S. at 168.

31. *See id.* at 176.

32. *Id.* (quoting Brief for Am. Psychiatric Ass'n et al. as Amici Curiae at 26, *Edwards*, 554 U.S. 164 (No. 07-208), 2008 WL 405546).

defense, making motions, arguing points of law, participating in voir dire, questioning witnesses, and addressing the court and jury.”<sup>33</sup> How might these capacities and tasks inform a representational competency standard? May a state include in its competency standard any cognitive, communicative, and performance-related ability useful for self-representation? *Edwards* does not provide a definitive answer to these questions.

In the eight years following *Edwards*, states have generated a patchwork of competency standards for self-representation. This constitutes an odd and uncomfortable arrangement because state thresholds for the exercise of federal constitutional rights typically should not vary.<sup>34</sup> A fifty-state survey conducted in May 2015 revealed that states differ in their desire to impose a higher competency standard for self-representation than to stand trial, level of specificity in the components of a representational competence standard, and extent to which those standards extend beyond cognitive abilities to capture elements of performance.<sup>35</sup> States also diverge in whether trial courts may or must apply a heightened representational competence standard to a gray-area defendant.<sup>36</sup> Research reveals that five states have affirmed that their competency standards for self-representation are the same as the standard to stand trial articulated in *Dusky v. United States*,<sup>37</sup>

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33. *Id.* (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984)).

34. See Marks, *supra* note 4, at 834; *State v. Connor*, 973 A.2d 627, 650 n.22 (Conn. 2009); see also Alan R. Felthous & Lauren E. Flynn, *From Competence to Waive Counsel to Competence to Represent Oneself: The Supreme Court Advances Fairness in Edwards*, 33 MENTAL & PHYSICAL DISABILITY L. REP. 14, 16 (2009) (warning of “the unfairness of diverse, unequal application of legal procedures”).

35. See *infra* Part I. For purposes of this analysis, I assume that a state has adopted a representational competence standard of a certain type if such a standard is reflected in a state statute, rule, or decision by any court in the state, so long as no higher court in that state has disproved of that standard. Because *Edwards* is a fairly recent decision, many state supreme courts have not yet addressed whether to embrace a higher competency standard for self-representation than to stand trial; therefore many of the opinions cited herein derive from lower courts. The analysis includes both reported and unreported cases, although the latter clearly have less precedential value, and reflects both statements crucial to a court’s holding as well as those made in dicta.

36. See *supra* note 7 (defining “gray-area defendant”). Some states hold that *Edwards* only applies to denials of pro se motions and that no constitutional violation occurs if a court allows a severely mentally ill defendant who is competent to stand trial to proceed pro se so long as his waiver of counsel was knowing and voluntary. See, e.g., *People v. Johnson*, 267 P.3d 1125, 1132 (Cal. 2012); *Duckett v. State*, 769 S.E.2d 743, 748 (Ga. Ct. App. 2015); *State v. Newson*, 767 S.E.2d 913, 920 (N.C. Ct. App. 2015). Other states, however, hold that *Edwards* imposes a duty on trial courts to investigate the competence of severely mentally ill defendants desiring to proceed pro se. These states permit gray-area defendants who were allowed to represent themselves at trial to challenge on appeal a trial court’s failure to apply a heightened standard of representational competence. See, e.g., *Connor*, 973 A.2d at 655; *State v. Leahy*, 854 N.W.2d 73, No. 13-0522, 2014 Iowa App. LEXIS 689 at \*21 (Ct. App. July 16, 2014); *State v. Holdsworth*, 798 A.2d 917, 924 (R.I. 2002).

37. 362 U.S. 402 (1960); see *Stewart-Bey v. State*, 96 A.3d 825, 839 (Md. Ct. Spec. App. 2014); *State v. Foss*, A09-2152, 2010 WL 4068708, at \*4 (Minn. App. Oct. 19, 2010); *Mathis v. State*, 271 P.3d 67, 74 n.21 (Okla. Crim. App. 2012); *State v. Barnes*, 753 S.E.2d 545, 550 (S.C. 2014); *State v. Maestas*, 299 P.3d 892, 962 n.330 (Utah 2012). In at least some of these states, a trial court will consider a defendant’s mental illness when assessing



and fourteen states have yet to address the effect of *Edwards* on their representational competence standards.<sup>38</sup>

This part focuses on the thirty-one states that have accepted, or have indicated a willingness to accept,<sup>39</sup> *Edwards*'s invitation to impose a heightened representational competence standard.<sup>40</sup> While most states have endorsed a vague standard that simply parrots language in *Edwards*,<sup>41</sup> a minority of states have adopted detailed standards that either eschew<sup>42</sup> or embrace<sup>43</sup> communicative abilities.

#### A. Vague, Heightened Standards

Of the thirty-one states that have adopted heightened competency standards for self-representation, twenty have failed to embellish that standard beyond the Court's general language in *Edwards*.<sup>44</sup> The standard

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the validity of his waiver of counsel. *See, e.g.*, *Smith v. State*, 524 A.2d 117, 172 (Md. Ct. Spec. App. 1987); *Gardner v. State*, 570 S.E.2d 184, 186 (S.C. 2002).

38. These states include Arkansas, Delaware, Georgia, Hawaii, Louisiana, Maine, Montana, New Hampshire, New Mexico, Oregon, South Dakota, Vermont, Virginia, and West Virginia.

39. *See supra* note 35. For an example of relevant dicta, see *Commonwealth v. Means*, 907 N.E.2d 646, 661 (Mass. 2009) ("We are, moreover, mindful of the admonition of the United States Supreme Court, which recently 'caution[ed] against the use of a single mental competency standard for deciding both (1) whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself . . .'" (citations omitted)).

40. This figure includes twenty states that have adopted general, vague standards for representational competence that exceed the *Dusky* standard to stand trial, *see infra* note 44, seven states that have adopted standards with a communication component, *see infra* Part I.C, and four states that have adopted standards that either consist solely of decisional abilities or explicitly exclude communication abilities, *see infra* Part I.B.

41. *See infra* Part I.A.

42. *See infra* Part I.B.

43. *See infra* Part I.C.

44. *See* FL. R. CRIM. P. 3.111(d)(3) ("Regardless of the defendant's legal skills or the complexity of the case, the court shall not deny a defendant's unequivocal request to represent himself or herself, if the court makes a determination of record that the defendant . . . does not suffer from severe mental illness to the point where the defendant is not competent to conduct trial proceedings by himself or herself."); *State v. Svanoe*, No. 1 CA-CR 08-0942, 2009 WL 5149956, at \*4 (Ariz. Ct. App. Dec. 29, 2009) (quoting *Indiana v. Edwards*, 554 U.S. 161, 178 (2008)); *State v. Hawkins*, 229 P.3d 379, 384 (Idaho App. 2009) (quoting *Edwards*, 554 U.S. at 178); *People v. Sheley*, 964 N.E.2d 170, 174 (Ill. App. Ct. 2012) ("[T]he Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." (quoting *Edwards*, 554 U.S. at 178)); *State v. Brown*, No. 103, 425, 2011 WL 3658364, at \*7 (Kan. Ct. App. Aug. 19, 2011) (quoting *Edwards*, 554 U.S. at 178); *Stinnett v. Commonwealth*, 364 S.W.3d 70, 82 (Ky. 2011) (citing *Edwards*, 554 U.S. at 178); *Commonwealth v. Means*, 907 N.E.2d 646, 661 (Mass. 2009) (noting "the admonition of the United States Supreme Court [that] 'caution[ed] against the use of a single mental competency standard for deciding both (1) whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself'" (citations omitted)); *People v. Brooks*, 809 N.W.2d 644, 653 (Mich. Ct. App. 2011), *aff'd in part and vacated in part*, 807 N.W.2d 303 (Mich. 2012) (citing *Edwards*, 554 U.S. at 178); *State v. Baumruk*, 280 S.W.3d 600, 609–10 (Mo. 2009) (en banc) ("In certain instances an individual may well be able to satisfy [the] mental

from Idaho is typical: “[T]he Constitution does not forbid a state from insisting upon representation by counsel for those competent enough to stand trial but who suffer from mental illness to the point where they are not competent to conduct trial proceedings by themselves.”<sup>45</sup> Others resemble this standard from Missouri:

In certain instances an individual may well be able to satisfy [the] mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel.<sup>46</sup>

A few states with vague, heightened representational competence standards adopted these standards prior to *Edwards* by appealing to a defendant’s right to a fair trial.<sup>47</sup> Seventeen of the twenty states dictate that, to deny

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competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel.” (citation omitted)); *State v. Lewis*, 785 N.W.2d 834, 840 (Neb. 2010) (holding “that under [Nebraska’s constitution], a criminal defendant’s right to conduct his or her own defense is not violated when the court determines that a defendant competent to stand trial nevertheless suffers from severe mental illness to the point where he or she is not competent to conduct trial proceedings without counsel,” and declining to adopt a more specific standard); *Wiesner v. State*, No. 64373, 2014 WL 4670115, at \*1 (Nev. Sept. 18, 2014) (quoting *Edwards*, 554 U.S. at 178); *State v. McNeil*, 963 A.2d 358, 365 (N.J. Super. Ct. App. Div. 2009) (“[A] defendant may be competent to stand trial if represented by counsel, but not have the ‘ability to play the significantly expanded role required for self-representation.’”); *State v. Lane*, 707 S.E.2d 210, 219 (N.C. 2011) (stating that a trial court may deny a pro se motion if “the defendant falls into the ‘gray area’ and is therefore subject to the ‘competency limitation’ described in *Edwards*,” and instructing that “[t]he trial court must make findings of fact to support its determination that the defendant is ‘unable to carry out the basic tasks needed to present his own defense without the help of counsel’”); *State v. Dahl*, 776 N.W.2d 37, 44 (N.D. 2009) (“District courts can reject a defendant’s waiver of the right to counsel if the defendant suffers from mental illness or impairment such that the defendant would not be competent to conduct trial proceedings without counsel, even if the defendant is otherwise competent to stand trial.”); *State v. Williams*, No. 99859, 2014 WL 1327758, at \*3–4 (Ohio Ct. App. Mar. 20, 2014) (quoting *Edwards*, 554 U.S. at 178); *Commonwealth v. Blakeney*, 108 A.3d 739, 759 (Pa. 2014) (“We acknowledge that where a court has concerns that a defendant seeking to represent himself may be mentally incompetent to do so, even though the defendant is competent to stand trial, the court may, in its sound discretion, deny a request to waive the right to counsel and proceed pro se on the ground that to do otherwise would compromise the defendant’s right to a fair trial.” (citation omitted)); *Chadwick v. State*, 309 S.W.3d 558, 561 (Tex. Crim. App. 2010) (quoting *Edwards*, 554 U.S. at 178); *State v. Burke*, 54 A.3d 500, 509 (Vt. 2012) (observing that “the Constitution permits judges to take realistic account of the particular defendant’s mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so,” and finding the defendant’s capacity for proceeding pro se “questionable” but affirming the trial court’s finding that defendant had waived his right to represent himself due to obstreperous conduct (quoting *Edwards*, 554 U.S. at 171)); *In re Rhome*, 260 P.3d 874, 878 (Wash. 2011) (en banc) (“[I]t is constitutionally permissible for a state to deny a defendant pro se status ‘on the ground that [he] lacks the mental capacity to conduct his trial defense’ even though he was found competent to stand trial.” (citation omitted)); see also *infra* note 47 (describing the standards of states that adopted a heightened competence standard for self-representation prior to *Edwards* on due process grounds).

45. *Hawkins*, 229 P.3d at 384 (citation omitted).

46. *Baumruk*, 280 S.W.3d at 609–10 (citations omitted).

47. See *Coleman v. State*, 914 So.2d 1254, 1255 (Miss. Ct. App. 2005) (“[The Mississippi Supreme Court has listed an exception to the defendant’s] right to waive the

self-representation to a defendant competent to stand trial, the defendant's incapacities must stem from a mental illness.<sup>48</sup> In fifteen of the twenty states, the mental illness must be "severe."<sup>49</sup>

While hewing to the Court's language in *Edwards* likely seemed a safe tack, these courts' decisions to refrain from particularizing their representational competence standards are fraught with danger. Since the publication of the *Edwards* decision, forensic clinicians have complained they lack a "useful," detailed standard sufficient to enable consistent judgments on defendants' competency to proceed pro se.<sup>50</sup> Until courts clearly define the legal standard, forensic psychiatrists and psychologists cannot select among potentially relevant clinical observations or develop appropriate assessment instruments.<sup>51</sup> Professor Richard Bonnie has observed that, when a competence assessment lacks normative content, it is "highly discretionary" and that "forensic clinicians rather than judges

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assistance of counsel and represent himself, . . . namely: . . . where the defendant is so physically or mentally incompetent to speak to the jury that his right to a fair trial is endangered."); *State v. Reddish*, 859 A.2d 1173, 1193 (N.J. 2004) ("The right to self-representation is not absolute. There may be times, during both the guilt phase and penalty phase [of a capital case], when the defendant will be required to cede control of his defense to protect the integrity of the State's interest in fair trials and permit courts to ensure that their judgments meet the high level of reliability demanded by the Constitution."); *State v. Kolocotronis*, 436 P.2d 774, 779–80 (Wash. 1968) ("[I]f the court determines that [the defendant] does not have the requisite mental competency to intelligently waive the services of counsel nor adequate mental competency to act as his own counsel, then his right to a fair trial and his constitutional right to due process of law, is disregarded if the court permits him to so act in a criminal case.").

48. *See, e.g., Sheley*, 964 N.E. at 174; *Lewis*, 785 N.W.2d at 840; *McNeil*, 963 A.2d at 365. *But see infra* note 49 (noting that Mississippi, Vermont, and Washington may not expressly require a finding of mental illness to deny the *Faretta* right on grounds of competence).

49. Indeed, all twenty states appear to cabin the *Edwards* limitation to defendants with "severe" mental illness except Idaho, Massachusetts, Mississippi, Vermont, and Washington. *See Hawkins*, 229 P.3d at 383–84 (confining the limiting to defendants with "mental illness"); *Means*, 907 N.E.2d at 661 (concerning a "mentally ill defendant's competence to waive counsel and self-represent"); *Coleman*, 914 So. 2d at 1255 (concerning "mentally incompetent" defendants); *Burke*, 54 A.3d at 509 (concerning a defendant's "mental capacities"); *In re Rhome*, 260 P.3d at 878, 883 (en banc) (concerning a defendant who "lacks the mental capacity to conduct his trial defense"). For a discussion of the obscurity of the meaning of "severe mental illness," see *infra* notes 281–84 and accompanying text.

50. *See* Alan R. Felthous, *The Right to Represent Oneself Incompetently: Competency to Waive Counsel and Conduct One's Own Defense Before and After Godinez*, 18 MENTAL & PHYSICAL DISABILITY L. REP. 105, 109 (1994) ("Merely citing 'to make one's defense' as a standard, without any elaboration, is too broad and vague to be useful."); *see also* Jason Beaman & Stephen Noffsinger, *Competency to Proceed Pro Se*, 41 J. AM. ACAD. PSYCHIATRY L. 583, 585 (2013) (emphasizing "the lack of an accepted standard for competency to proceed pro se, other than that the decision is made knowingly and voluntarily"); Andrew Kaufman et al., *Survey of Forensic Mental Health Experts on Pro Se Competence After Indiana v. Edwards*, 39 J. AM. ACAD. PSYCHIATRY L. 565, 565 (2011) ("In the three years since the U.S. Supreme Court's decision in *Indiana v. Edwards*, trial court judges have been charged with making decisions about self-representational competency without a specific test to apply.").

51. Jennifer L. Moore & Katherine Ramsland, *Competence Assessment, Diverse Abilities, and a Pro Se Standard*, 39 J. PSYCHIATRY & L. 297, 313–14 (2011).

effectively exercise discretion to define competence.”<sup>52</sup> In addition, while recognition of a vague, heightened standard maximizes trial courts’ ability to avoid unfair and unreliable trials,<sup>53</sup> forensic clinicians and trial courts within such states will employ in practice a variety of formulations of representational competence, which will require an appellate court in each case to decide if the set of considered impairments strays beyond the bounds of *Edwards* or the dictates of *Faretta v. California*.<sup>54</sup>

### B. Standards Limited to Cognitive Capacities

In contrast, at least four states—New York, Colorado, Rhode Island, and Alabama—have articulated more detailed representational competence standards that involve only decisional abilities.<sup>55</sup> These states frame the key inquiry as competence to waive the right to counsel, not competence to represent oneself.<sup>56</sup> Recognizing that a mentally ill defendant may lack the capacity to appreciate the demands inherent in self-representation, New York and Rhode Island consider a defendant’s mental capacities as part of the “searching inquiry” designed to assess the efficacy of his waiver of counsel.<sup>57</sup> Similarly, Colorado recognizes that mental illness can impact both the voluntariness and knowingness of a defendant’s waiver.<sup>58</sup> Alabama utilizes the same competency standard for self-representation as to stand trial but, in both instances, requires that a defendant have a “capacity to appreciate his position and make a rational choice.”<sup>59</sup>

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52. Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539, 549–50 (1993).

53. *But see* *Indiana v. Edwards*, 554 U.S. 164, 189 (2008) (Scalia, J., dissenting) (“Once the right of self-representation for the mentally ill is a sometime thing, trial judges will have every incentive to make their lives easier . . . by appointing knowledgeable and literate counsel.”).

54. 422 U.S. 806 (1975); *see* Marks, *supra* note 4, at 838.

55. *See* *Lackey v. State*, 104 So.3d 234, 242 (Ala. Crim. App. 2010); *People v. Davis*, 352 P.3d 950, 955 (Colo. 2015); *People v. Stone*, 983 N.Y.S.2d 454, 459 (N.Y. 2014); *State v. Holdsworth*, 798 A.2d 917, 921 (R.I. 2002).

56. It is arguable that these four states’ approaches, rather than calling for a heightened standard of representational competence, merely draw attention to the obvious fact that mental illness can undermine the validity of a defendant’s waiver of the right to counsel. *See* *Godinez v. Moran*, 509 U.S. 389, 400–01, 401 n.12 (1993).

57. *Stone*, 983 N.Y.S.2d at 457–58; *Holdsworth*, 798 A.2d at 921, 924 (applying “a heightened standard of competency” when a defendant seeks to waive counsel and represent himself).

58. *Davis*, 352 P.3d at 956 (explaining that this “analytical framework provides the standards necessary for trial courts to exercise the discretion described in *Edwards*” and “accomplishes the *Edwards* Court’s objective for trial courts to consider more than just *Dusky* when analyzing a mentally ill defendant’s waiver of the right to counsel”).

59. *See* *Lackey*, 104 So.3d at 243 (explaining that evaluation involves a determination of “(1) whether that person suffers from a mental disease, disorder, or defect; (2) whether a mental disease, disorder, or defect prevents that person from understanding his legal position and the options available to him; and (3) whether a mental disease, disorder, or defect prevents that person from making a rational choice among his options” (quoting *Hauser ex rel. Crawford v. Moore*, 223 F.3d 1316, 1322 (11th Cir. 2000))).

*C. Standards Involving Communication or Performance Skills*

The balance of the thirty-one states with heightened representational competence standards includes seven states that have adopted standards with a communication component. While a trial court potentially could consider a defendant's communication abilities under any of the twenty vague standards discussed above,<sup>60</sup> Alaska, California, Connecticut, Indiana, Iowa, Wisconsin, and Wyoming have adopted representational competency standards that contain, explicitly or in practice, a communication or performance component.<sup>61</sup> While all have affirmed the relevance of a defendant's communication or performance skills, the standards differ in the prominence afforded to these abilities in the pro se inquiry, the range of communication deficiencies recognized, and whether any impairments must derive from a mental illness, severe or otherwise. This section examines standards most clearly endorsing consideration of a defendant's communicative abilities before discussing standards that are more nebulous.

Wisconsin's representational competence standard explicitly calls for consideration of a broad range of communicative factors. In 1980, the Wisconsin Supreme Court proclaimed in *Pickens v. State*<sup>62</sup>: "Surely a defendant who, while mentally competent to be tried, is simply incapable of effective communication or, because of less than average intellectual powers, is unable to attain the minimal understanding necessary to present a defense, is not to be allowed 'to go to jail under his own banner.'" <sup>63</sup> A determination of representational competence requires an evaluation of a person's ability to provide "'meaningful' self-representation," which includes "the practical ability to make arguments, present evidence, and ask effective questions."<sup>64</sup> Accordingly, trial courts should consider the

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60. For instance, Texas has formally adopted the vague language in *Edwards* as its representational competence standard, but its case law demonstrates that the quality and content of defendants' communications often dominate courts' analysis. See *In re J.G.*, 04-13-00825-CV, 2014 WL 4627599, at \*3-4 (Tex. App. Sept. 17, 2014) (upholding the denial of the defendant's request to represent himself on the basis of his behavior at trial, including his attempts "to raise objections and question witnesses" and his "rambling monologues, ad hominem attacks, and unregulated outbursts"); *Chadwick v. State*, 309 S.W.3d 558, 561-62 (Tex. Crim. App. 2010) (affirming that a defendant's mental illness was severe enough to render him incompetent to proceed pro se where the defendant "interrupted his attorney several times[,] . . . objected several times, even as the judge granted the motions filed by his attorney," cursed the judge, "engaged in a rambling monologue in which he launched personal attacks on the prosecutor, the judge, the bailiffs, judges from prior cases, and his attorney," and filed "several incoherent pro se written motions").

61. See *supra* note 35 (outlining important parameters of this analysis).

62. 292 N.W.2d 601 (Wis. 1980).

63. *Id.* at 611 (quoting *United States v. Denno*, 348 F.2d 12, 15 (2d Cir. 1965)); accord *State v. Imani*, 786 N.W.2d 40, 49, 53 (Wis. 2010).

64. *In re Termination of Parental Rights to Sophia S.*, 715 N.W.2d 692, 699 (Wis. Ct. App. 2006) (citing *State v. Marquardt*, 705 N.W.2d 878 (La. 2005)); see also *State v. Klessig*, 564 N.W.2d 716 (Wis. 1997); *Pickens*, 292 N.W.2d 601. Although *In re Termination of Parental Rights to Sophia S.* was not a criminal case, the court held applicable the representational competency standards developed in the line of criminal cases

defendant's level of education, degree of literacy, fluency in English, and "any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury."<sup>65</sup> A Wisconsin court recently held this standard constitutional and consistent with *Edwards*.<sup>66</sup>

In Wisconsin, a finding of representational incompetence need not depend on a finding of mental illness, severe or not.<sup>67</sup> One man was found incompetent to proceed pro se where he possessed a tenth-grade education, asserted (without more) that he read at a college level, and had merely an "observational" experience with the criminal court system.<sup>68</sup> In a case involving a defendant with no discernable cognitive or expressive impairments, a Wisconsin court affirmed a finding of representational incompetence on grounds that the defendant—who failed to provide the trial court with drafts of specific trial documents—"did not demonstrate any ability to prepare," lacked an understanding of certain trial procedure, and failed to demonstrate a readiness to argue two pending motions.<sup>69</sup> Wisconsin courts have also applied this representational competence standard to withhold self-representation from defendants with serious neurological or mental health issues.<sup>70</sup>

In contrast to Wisconsin's detailed "effective communication" standard, Alaska, Indiana, Connecticut, and Iowa have adopted "coherent"

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beginning with *Pickens*. See *In re Termination of Parental Rights to Sophia S.*, 715 N.W.2d at 696.

65. *Pickens*, 292 N.W.2d at 611; see also *Imani*, 786 N.W.2d at 53–54; *In re Termination of Parental Rights to Sophia S.*, 715 N.W.2d at 699 ("Collectively, published cases have identified the following self-representation competency considerations: education, literacy, fluency in English, the ability to communicate effectively, the complexity of the case, the ability to put the other side to its burden of proof, the ability to understand what is necessary to present a defense, experience in the legal system, a person's actual handling of the case, whether the person is unruly or unmanageable, physical disabilities, psychological disabilities, mental illness, and the opinion of medical and psychological experts regarding self-representation competency if the opinions identify relevant and specific problems. This listing is not exclusive; courts may consider other factors if they have an effect on meaningful self-representation." (citations omitted)).

66. See *State v. Jackson*, 867 N.W.2d 814, 822 (Wis. Ct. App. 2015).

67. See *Pickens*, 292 N.W.2d at 611 ("Other disabilities, besides mental diseases and defects of the type that render one incompetent to stand trial, may likewise make meaningful self-representation impossible."); accord *Imani*, 786 N.W.2d at 53; see also *Jackson*, 867 N.W.2d at 822 ("Nothing in *Edwards* establishes severe mental illness as the only circumstance in which a trial judge may deny the right of self-representation. The Supreme Court in *Edwards* declined to adopt a federal constitutional competency standard and specifically recognized an individual trial court's authority to make competency determinations.").

68. *Imani*, 786 N.W.2d at 54.

69. *Jackson*, 867 N.W.2d at 818, 824.

70. See *State v. Dehler*, Nos. 2009AP1500-CR, 2009AP1501-CR, 2010 WL 3119778, at \*4 (Wis. Ct. App. Aug. 10, 2010) (denying self-representation based on the defendant's seizure disorder, tendency to fixate on subjects or topics regardless of their actual significance, deficits in attention, concentration, working memory, judgment and planning, and poor coping, problem-solving, and stress management skills); *State v. Marquardt*, 705 N.W.2d 878, 892–93 (Wis. 2005) (denying the pro se right on the basis of the defendant's "microscopic review" of things, inability to detach, and delusional disorder of paranoid schizophrenia, which interfered with his ability to plan a realistic defense strategy).

communication standards.<sup>71</sup> These standards are simple but potentially capacious. Under the rubric of coherent communication, courts in these states could theoretically consider all of the communicative factors endorsed in Wisconsin. Alternatively, the courts could reduce their gaze to communication that reveals disordered (or incoherent) thought. Apprehending the full scope of these standards awaits further development in the case law.

Alaska's representational competence standard predates *Edwards* and was inspired by a desire to prevent unjust verdicts.<sup>72</sup> In *McCracken v. State*,<sup>73</sup> the Alaska Supreme Court stated, "In order to prevent a perversion of the judicial process, the trial judge should first ascertain whether a prisoner is capable of presenting his allegations in a rational and coherent manner before allowing him to proceed pro se."<sup>74</sup> Interpreting this standard in light of *Edwards*, an appellate court explained that "the question is whether the defendant is capable of presenting his or her case in an understandable way," not "whether the defendant . . . is capable of distinguishing a good defense from a poor one."<sup>75</sup> Like Wisconsin, Alaska does not construe *Edwards* as requiring "serious mental illness" as a necessary condition to representational incompetence.<sup>76</sup> One Alaskan court denied self-representation when an individual with a personality disorder submitted "irrational pleadings and objections" and exhibited "obstreperous courtroom conduct."<sup>77</sup> Another reversed a trial court's grant of a defendant's pro se request with the explanation that "defendants who suffer from paranoid delusions which clearly affect their ability to perceive the evidence against them are not in a position to represent themselves," as they are clearly unable to present a rational and coherent defense.<sup>78</sup>

Indiana also considers the coherence of a defendant's communications in assessing representational competence but will deny self-representation

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71. See *McCracken v. State*, 518 P.2d 85, 91 (Alaska 1974) ("In order to prevent a perversion of the judicial process, the trial judge should first ascertain whether a prisoner is capable of presenting his allegations in a rational and coherent manner before allowing him to proceed pro se."); *State v. Connor*, 973 A.2d 627, 657 (Conn. 2009) (instructing that the representational competence inquiry should include assessment of the defendant's "ability to communicate coherently with the court and the jury"); *Edwards v. State*, 902 N.E.2d 821, 829 (Ind. 2009) ("[I]f a defendant is so impaired that a coherent presentation of a defense is unlikely, fairness demands that the court insist upon representation."); *State v. Jason*, 779 N.W.2d 66, 76 n.2 (Iowa App. 2009) (indicating that the trial court should assess the defendant's "ability to communicate coherently with the court and the jury" when deciding whether to recognize his right to proceed pro se (quoting *Connor*, 973 A.2d at 657)).

72. See *McCracken*, 518 P.2d at 91–92.

73. 518 P.2d 85 (Alaska 1974).

74. *Id.* at 91; accord *Else v. State*, 555 P.2d 1210, 1211–12 (Alaska 1976).

75. *Falcone v. State*, 227 P.3d 469, 474 (Alaska Ct. App. 2010). The court cautioned that "many defendants will be capable of presenting a coherent case even though, from a legal standpoint, their asserted defense is dubious or even plainly wrong." *Id.*

76. *Id.* at 473 ("We do not read the *Edwards* decision to require 'serious mental illness' as a necessary condition before a trial judge can limit the right of self-representation.").

77. *Id.* at 470.

78. *Adams v. State*, 829 P.2d 1201, 1206 (Alaska Ct. App. 1992).

only when impairments originate from a severe mental illness.<sup>79</sup> In *Edwards v. State*,<sup>80</sup> on remand from the U.S. Supreme Court, the Indiana Supreme Court declared that, “if a defendant is so impaired that a coherent presentation of a defense is unlikely, fairness demands that the court insist upon representation.”<sup>81</sup> There, the court affirmed the finding that the defendant’s severe mental illness rendered him incompetent to conduct trial proceedings by citing, among other things, his “rambling” and “voluminous” writings, which demonstrated an inability to remain focused and a disorganized thought process.<sup>82</sup> Following *Edwards*, other courts have found defendants with severe mental illnesses incompetent when evidence of delusional, psychotic, and disordered thinking similarly demonstrates that they “cannot communicate coherently with the Court.”<sup>83</sup>

In Connecticut, the state supreme court exercised its supervisory authority to hold that, “upon a finding that a mentally ill or mentally incapacitated defendant is competent to stand trial and to waive his right to counsel at trial, the trial court must [determine] whether the defendant also is competent to conduct the trial proceedings without counsel.”<sup>84</sup> The court emphasized:

[T]he determination of his competence or lack thereof must be predicated solely on his ability to “carry out the basic tasks needed to present his own defense without the help of counsel”; notwithstanding any mental incapacity or impairment serious enough to call that ability into question. Of course, in making this determination, the trial court should consider the manner in which the defendant conducted the trial proceedings and whether he grasped the issues pertinent to those proceedings, along with his ability to communicate coherently with the court and the jury.<sup>85</sup>

The court urged trial courts to “consider all pertinent factors in determining whether the defendant has sufficient mental capacity to discharge the essential functions necessary to conduct his own defense, including the defendant’s ability to relate to the court or the jury in a coherent manner.”<sup>86</sup> This instruction, and the state supreme court’s repeated focus on “mental incapacities” as the relevant body of deficiencies, implies that the court

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79. The Indiana Supreme Court considered adopting a standard that would allow trial courts to “deny a criminal defendant the right to represent himself at trial where the defendant cannot communicate coherently with the court or jury” without a severe mental illness limitation. See *Edwards v. State*, 902 N.E.2d 821, 829 (Ind. 2009), *remanded from* 554 U.S. 164 (2008). The court rejected the standard on Supremacy Clause grounds, however, as it feared the proposed standard would unduly restrict the federal right to self-representation. *Id.*

80. 902 N.E.2d 821 (Ind. 2009).

81. *Id.* at 829.

82. *Id.* at 826–27.

83. *Valdez v. State*, No. 18A05-1407-CR-304, 2015 WL 302272, at \*2, \*9–11 (Ind. Ct. App. Jan. 22, 2015). The trial court also cited a lack of familiarity with rules of evidence, voir dire, and a “lack of trial skills” in support of its conclusion that the defendant’s “lack of capacity threatens an improper conviction or sentence.” *Id.* at \*3.

84. *State v. Connor*, 973 A.2d 627, 650–51 (Conn. 2009) (internal citations omitted).

85. *Id.* at 657.

86. *Id.* at 657 n.32.



would restrict cognizable communication impairments to those associated with cognitive incapacities.<sup>87</sup> To date, Connecticut has indicated that findings of representational incompetence can rest on impairments “due to mental illness *or other mental incapacity*,” suggesting that a predicate of severe mental illness, and perhaps even mental illness, is unnecessary.<sup>88</sup>

Iowa courts apply a similar standard but restrict cognizable communication difficulties to those stemming from a severe mental illness.<sup>89</sup> Motivated by a desire to ensure a fair trial,<sup>90</sup> the Iowa Court of Appeals in *State v. Jason*<sup>91</sup> endorsed Connecticut’s standard of representational competence outlined in *State v. Connor*.<sup>92</sup> In *Jason*, the appellate court remanded for reconsideration a trial court’s decision to allow a defendant with Asperger’s syndrome to proceed pro se. The court read *Edwards* as requiring a predicate of “severe mental illness”<sup>93</sup> and observed that psychological and psychiatric experts had disagreed over whether Asperger’s syndrome could produce cognitive impairment.<sup>94</sup> The court found that the defendant in that case “may be a ‘gray-area’ defendant who was competent to stand trial, but not competent to take on the expanded role of representing himself at trial.”<sup>95</sup> In so doing, the court appeared willing to accept a broad conception of “severe mental illness” as perhaps including any long-standing or chronic disorder that produces abnormal “cognitive, perceptual, [or] affective responses.”<sup>96</sup> The court’s potentially broad reading of severe mental illness was confirmed in *State v. McCullah*,<sup>97</sup> where the court mused that anxiety, attention deficit hyperactivity disorder, and antisocial personality disorder may also constitute severe mental illnesses that could compromise an individual’s ability to represent himself.<sup>98</sup> The court later affirmed a trial court’s determination that antisocial personality disorder did not constitute a cognizable severe mental illness under *Edwards*.<sup>99</sup>

In guidance less direct than in the preceding four states, the California Supreme Court has suggested that coherent communication may be relevant

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87. *See id.*

88. *See id.* at 633 (emphasis added); *see also id.* at 655.

89. *See State v. Jason*, 779 N.W.2d 66, 74 (Iowa Ct. App. 2009) (quoting *Connor*, 973 A.2d at 655 ).

90. *Id.* at 75.

91. 779 N.W.2d 66 (Iowa Ct. App. 2009).

92. 973 A.2d 627 (Conn. 2009); *see Jason*, 779 N.W.2d at 76 n.2 (quoting *Connor*, 973 A.2d at 656).

93. *See Jason*, 779 N.W.2d at 75 (framing the issue as “whether Asperger’s syndrome is a ‘severe mental illness,’ which necessarily hampers a defendant’s self-representation right”).

94. *See id.* (comparing testimony of Dr. Gersh with that of Dr. Olsen).

95. *Id.* at 75–76.

96. *Id.* at 75 (quoting Dr. Olsen).

97. No. 08-0403, 2010 WL 5394747 (Iowa Ct. App. Dec. 22, 2010).

98. *Id.* at \*10.

99. *See State v. McCullah*, No. 12-0081, 2013 WL 530943, at \*3 (Iowa Ct. App. Feb. 13, 2013) (“We agree with the district court that an ‘inflated conception of his own trial skills does not mean [McCullah] was suffering from a severe mental illness.’”).

to a defendant's ability to represent himself at trial.<sup>100</sup> Until 1996, California courts required that pro se defendants have the capacity to use information rationally and to communicate in a coherent manner.<sup>101</sup> In *People v. Burnett*,<sup>102</sup> an appellate court held that "competence to waive counsel . . . includes an array of basic cognitive and communicative skills relating to the presentation of a defense to criminal charges,"<sup>103</sup> including an ability to "coherently communicate [a response to the charges] to the trier of fact."<sup>104</sup> California courts abrogated this standard in light of the U.S. Supreme Court's decision in *Godinez v. Moran*,<sup>105</sup> which held that federal law does not necessitate a higher standard of competence for waiving counsel or pleading guilty than is required to stand trial.<sup>106</sup>

After the *Edwards* decision, the California Supreme Court at least partially revived the *Burnett* standard and its coherent communication component. In *People v. Johnson*,<sup>107</sup> the state supreme court recognized that *Edwards* characterized representational competence "as the ability 'to carry out the basic tasks needed to present [one's] own defense without the help of counsel'" and permitted states to "deny self-representation to those competent to stand trial but who 'suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.'"<sup>108</sup> The court adopted *Edwards*'s characterization of capacities necessary for representational competence and opted not to articulate a more precise standard.<sup>109</sup> However, the court provided additional guidance by suggesting that trial courts and experts asked to examine defendants' representational competence consider the competency standard previously articulated in *Burnett*, as well as the standards proposed in two law review articles.<sup>110</sup> The court favorably quoted this language relevant to communication from an article by Jason Marks:

A criminal defendant is mentally incompetent to represent himself or herself at trial if and only if a mental disorder or disability would prevent the defendant from . . . communicating with the witnesses, the court, the

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100. See *People v. Johnson*, 267 P.3d 1125, 1132 (Cal. 2012).

101. See *People v. Hightower*, 49 Cal. Rptr. 2d 40, 43 (Cal. App. 1996).

102. 234 Cal. Rptr. 67 (Cal. Ct. App. 1987).

103. *Id.* at 76.

104. *Id.*; see also *id.* at 74 ("It is demeaning to such a person and makes a mockery of justice for trial judges to countenance the charade that would inevitably arise in some cases if competence to waive counsel were not deemed to include the ability to at least rationally conceive and coherently present a bare bones defense.").

105. 509 U.S. 389 (1993).

106. See *Hightower*, 49 Cal. Rptr. 2d at 43; see also *Godinez*, 509 U.S. 389.

107. 267 P.3d 1125 (Cal. 2012).

108. *Id.* at 1132 (quoting *Indiana v. Edwards*, 554 U.S. 164, 175–76 (2008)).

109. *Id.* ("[P]ending further guidance from the high court, we believe the standard that trial courts considering exercising their discretion to deny self-representation should apply is simply whether the defendant suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel.").

110. See *id.* (suggesting that *Burnett* and two law review articles "are helpful to the extent they suggest relevant factors to consider").

prosecutor, and the jury in a manner calculated to implement those strategies and tactics in at least a rudimentary manner.<sup>111</sup>

The court also favorably quoted the standard proposed by this author, which includes an ability to “communicate decisions to a functionary of the court.”<sup>112</sup>

Following this pronouncement, California appellate courts have affirmed the denial of multiple defendants’ pro se motions at least partially on the basis of communication difficulties. For example, in *People v. Gardner*,<sup>113</sup> an appellate court quoted at length the opinion of a forensic psychiatrist in finding a defendant with expressive language disorder incompetent to represent himself.<sup>114</sup> The doctor observed that, although the defendant did “not have any thought process impairments or psychotic symptoms that would prevent him from engaging rationally with an attorney” and “demonstrated the ability to engage in strategizing and future-planning,”<sup>115</sup> he “was impaired in his ability to string [legal terms] together articulately in an effective and articulate presentation” and “struggled with expressing himself” without the doctor’s clarifications.<sup>116</sup> The doctor therefore found—and the appellate court affirmed—that the defendant’s expressive disorder was such that he would “not be able to communicate with the [c]ourt or a jury with sufficient clarity to make himself understood in real time during trial.”<sup>117</sup> Other courts have highlighted rambling and nonsensical filings as illustrating a defendant’s disordered thought process.<sup>118</sup> California courts have also factored a defendant’s thick foreign accent and misuse of the English language into his competence to represent himself, at least when such defendants also suffer from mental illness.<sup>119</sup>

Finally, a Wyoming statute provides that “[n]o person shall be tried, sentenced or punished for the commission of an offense while, as a result of mental illness or deficiency, he lacks the capacity, to . . . [c]onduct his defense in a rational manner.”<sup>120</sup> This requirement is part of the state’s competence to stand trial standard and was enacted to protect defendants’ due process rights.<sup>121</sup> When evaluating an individual’s ability to conduct a

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111. *Id.* at 1131–32 (quoting Marks, *supra* note 4, at 847).

112. *Id.* at 1132 (quoting Johnston, *supra* note 4, at 595).

113. 180 Cal. Rptr. 3d 528 (Ct. App. 2014).

114. *See id.* at 535.

115. *Id.* at 534.

116. *Id.*

117. *Id.* at 535 (“Communication in court requires that decisions be made quickly and sometimes under pressure. Decisions facing defendants representing themselves include all the basic strategic and tactical choices of trial, such as what motions to make, what witnesses to call, and what arguments to make to the jury. [Defendant] clearly lacks the ability to communicate clearly.”).

118. *See People v. Johnson*, 267 P.3d 1125, 1134 n.2 (Cal. 2012).

119. *See People v. Mosley*, No. B237690, 2014 WL 280345, at \*5 (Cal. Ct. App. Jan. 27, 2014).

120. WYO. STAT. ANN. § 7-11-302 (West 2013). To date, no cases have applied this language in the context of self-representation.

121. *See Fletcher v. State*, 245 P.3d 327, 331–32 (Wyo. 2010).

defense in a rational manner, courts consider any communication disabilities, such as those stemming from an expressive disorder.<sup>122</sup>

Crucially, the standards outlined above diverge in whether they apply only to defendants with a mental illness and in whether that mental illness must be severe. Alaska and Wisconsin do not require any finding of mental illness (severe or otherwise) for a determination of incompetence to proceed *pro se*.<sup>123</sup> The standards in Connecticut and Wyoming, on the other hand, appear applicable to defendants with a mental illness of any severity.<sup>124</sup> Finally, Iowa, Indiana, and California restrict representational competence requirements to defendants with a “severe” mental illness.<sup>125</sup>

#### *D. Taxonomy of Communication Difficulties*

The seven state standards with communication components and the cases in which they have been applied suggest the existence of at least four categories of communication impairments, each of possibly differing constitutional significance: disordered speech, inability to be understood by courtroom actors, inability to communicate in a timely manner, and suboptimal advocacy. These categories differ in the degree to which they reflect or necessarily coexist with mental illness or cognitive impairment and whether they are susceptible to amelioration by standby (or hybrid)<sup>126</sup> counsel. Thus, these categories of impairments vary in the extent to which they implicate a defendant’s autonomy, as well as the fairness or accuracy of an adjudication. Disaggregating and separately exploring these types of impairments allows the discernment of precisely when, and on what basis, a

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122. See *id.* at 333 (taking note of the defendant’s possible expressive and receptive language dysfunction as part of the competency to stand trial inquiry).

123. See *supra* notes 67, 76.

124. See *State v. Connor*, 973 A.2d 627, 650 (Conn. 2009) (adopting “for mentally ill or mentally incapacitated defendants who wish to represent themselves at trial a competency standard that differs from the standard for determining whether such a defendant is competent to stand trial”); see also WYO. STAT. ANN. § 7-11-302.

125. See *People v. Johnson*, 267 P.3d 1125, 1132 (Cal. 2012); *Edwards v. State*, 902 N.E.2d 821, 824 (Ind. 2009); *State v. Jason*, 779 N.W.2d 66, 75 (Iowa Ct. App. 2009).

126. Judge Colquitt has explained the difference between hybrid and standby counsel in this way:

[H]ybrid representation consists of concurrent self-representation and representation by counsel. The hybrid model differs considerably from standby or advisory counsel in that it constitutes a “co-counsel” model which involves actual assistance of the attorney in the trial process. In the advisory-counsel model, the attorney generally only counsels the defendant, although if the need arises the attorney may assist in the presentation of motions or the offering of objections. Standby or advisory counsel normally are not permitted to represent actively the defendant, while hybrid counsel actually share in such activities as jury selection, opening statements, examination of witnesses, and closing arguments. *Pro se* defendants act as their own counsel, but may consult with the standby counsel at reasonable times. By way of contrast, in hybrid cases, the accused and the attorney share the role of counsel, although the defendant may well take the lead in the case.

Colquitt, *supra* note 18, at 74–75.

court may deny self-representation consistent with Sixth Amendment jurisprudence and the normative lens developed in Part II.<sup>127</sup>

### 1. Disordered Speech

The first category of communication impairment involves disordered speech. Communications of this kind may be symptomatic of several mental illnesses, including schizophrenia,<sup>128</sup> schizotypal personality disorder,<sup>129</sup> schizophreniform disorder,<sup>130</sup> or schizoaffective disorder.<sup>131</sup> According to the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), disordered thinking and speech are key features of psychotic disorders and may present in various ways:

Disorganized thinking (formal thought disorder) is typically inferred from the individual's speech. The individual may switch from one topic to another (derailment or loose associations). Answers to questions may be obliquely related or completely unrelated (tangentiality). Rarely, speech may be so severely disorganized that it is nearly incomprehensible and resembles receptive aphasia in its linguistic disorganization (incoherence or "word salad").<sup>132</sup>

Often, individuals with a thought disorder and exhibiting disorganized speech have serious cognitive impairments, including "decrements in declarative memory, working memory, language function, and other executive functions, as well as slower processing speed."<sup>133</sup> Given the

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127. Although the focus of this article remains fixed on representational competence, it is important to note that the impairments explored below may also affect an individual's competence to stand trial. Indeed, other commentators have argued that there are no gray-area defendants if competency to proceed is properly defined to include aspects of adjudicative and decisional competence. See Slobogin, *supra* note 4, at 405–06. For purposes of this Article, however, I (like the Court in *Edwards*) assume the existence of gray-area defendants who are competent to stand trial but may be incompetent to represent themselves at trial. See *supra* note 7 and accompanying text.

128. See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 99–100 (Emily A. Kuhl & Susan K. Schultz eds., 5th ed. 2013) [hereinafter DSM-5] (detailing the diagnostic criteria of schizophrenia, which include disorganized speech).

129. See *id.* at 655–56 (listing "odd thinking and speech (e.g., vague, circumstantial, metaphorical, overelaborate, or stereotyped)" as a symptom of schizotypal personality disorder); *id.* at 656 ("Their speech may include unusual or idiosyncratic phrasing and construction. It is often loose, digressive, or vague, but without actual derailment or incoherence. Responses can be either overly concrete or overly abstract, and words or concepts are sometimes applied in unusual ways (e.g., the individual may state that he or she was not 'talkable' at work).").

130. See *id.* at 96–97 (manifesting in symptoms identical to schizophrenia but distinguished by shorter total duration of illness; includes symptom of "disorganized speech (e.g., frequent derailment or incoherence)").

131. See *id.* at 105–06 (defined in part as "an uninterrupted period of illness during which there is a major mood episode (major depressive or manic) concurrent with Criterion A of schizophrenia").

132. *Id.* at 88.

133. *Id.* at 101–02 (referring to schizophrenia and stating that "[i]mpaired cognition is common, and alterations in cognition are present during development and precede the emergence of psychosis, taking the form of stable cognitive impairments during adulthood.

established relationship between disorganized speech and thought disorders, disorganized speech may be a strong indicator of cognitive impairment and, possibly, an impaired means of recognizing and advancing one's best interests. Accordingly, a number of courts have denied self-representation to defendants exhibiting disordered speech.<sup>134</sup>

## 2. Inability to Be Understood by Courtroom Actors

A second category of communication impairment prevents a defendant from being understood by courtroom actors. Because the defendant's competency to stand trial is not at issue,<sup>135</sup> he will necessarily be able to communicate adequately with counsel in written or oral form, perhaps with the assistance of a translator.<sup>136</sup> A pro se defendant, however, must interact effectively with a judge, opposing counsel, and potentially witnesses. A number of impediments can interfere with a defendant's ability to verbalize intelligible speech to these individuals. For instance, a defendant may have a speech impediment such a stutter or lisp,<sup>137</sup> a tic disorder such as Tourette's syndrome, Parkinson's disease, soft speech, or a thick foreign accent.<sup>138</sup> Impairments in this category may or may not originate from a mental illness,<sup>139</sup> and they often will not reflect any deficits in cognitive abilities.<sup>140</sup>

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Cognitive impairments may persist when other symptoms are in remission and contribute to the disability of the disease").

134. See, e.g., *People v. Johnson*, 267 P.3d 1125, 1134 n.2 (Cal. 2012) (illustrating how the defendant's "delusional thought disorder" impaired his ability to represent himself by appending a rambling, nonsensical, incoherent document consisting of unrelated sentence fragments that had been submitted by the defendant); *Edwards v. State*, 902 N.E.2d 821, 824, 826–27 (Ind. 2009) (affirming the defendant's representational incompetence by citing, among other things, his "rambling" and "voluminous" writings, which demonstrated an inability to remain focused and a disorganized thought process); *Valdez v. State*, No. 18A05-1407-CR-304, 2015 WL 302272, at \*3–4, \*9–11 (Ind. Ct. App. Jan. 22, 2015) (upholding a finding of representational incompetence where the trial court provided numerous examples of delusional, psychotic, and disordered thinking as evidence that the defendant, diagnosed with paranoid schizophrenia, "cannot communicate coherently with the Court"). All seven standards with communication components—and presumably the twenty standards embracing the vague language from *Edwards*—would recognize problematic communications falling in this category. See, e.g., *supra* note 134 (including representative cases from states with communication-based representational competence standards).

135. See *supra* note 127.

136. See *supra* note 26 (articulating the legal standard for competence to stand trial).

137. See *Savage v. Estelle*, 924 F.2d 1459, 1460 (9th Cir. 1990) (holding that a trial court may deny a criminal defendant's right to represent himself at trial where the defendant's severe speech impediment renders him unable to articulate his own defense).

138. See *People v. Mosley*, No. B237690, 2014 WL 280345, at \*5–6 (Cal. Ct. App. Jan. 27, 2014) (upholding a finding of representational incompetence based originally, in part, on the defendant's thick foreign accent and misuse of the English language); cf. *Pickens v. State*, 292 N.W.2d 601, 611 (Wis. 1980) (including "fluency in English" as a factor relevant to representational incompetence).

139. See DSM-5, *supra* note 128, at 44–45 (defining diagnostic criteria for speech sound disorder, of which lisping is a particularly common variant); *id.* at 45–46 (defining diagnostic criteria for childhood-onset fluency disorder, or stuttering); *id.* at 81–83 (defining tic disorders).

140. See *supra* note 139 (including diagnostic criteria and commentary in the DSM-5).

### 3. Inability to Communicate in a Timely Fashion

A third category of communication impairment involves an inability to communicate to common courtroom actors within the bustle of trial. Trial is stressful and requires a defendant to make decisions within a short period of time before an impatient, potentially hostile audience.<sup>141</sup> While a host of cognitive, affective, and behavioral impairments can impair a defendant's ability to make or execute decisions in a short timeframe,<sup>142</sup> a defendant's participation may be subverted by communicative problems as well. For instance, he may have slowed speech, interpose lengthy pauses before speaking,<sup>143</sup> or require excessive clarification to be understood.<sup>144</sup> Impaired expressions of this sort may coexist with cognitive dysfunction or could reflect anxiety or deficits in social skills. Relatedly, these impairments may, or may not, flow from a recognized mental illness, severe or not.

### 4. Suboptimal Advocacy

A fourth category of communication impediments includes conditions that do not fall into the other three categories but still impede the optimal execution of a defense. Conditions of this type, such as low educational attainment, lack of reading fluency, or lack of familiarity with criminal law or procedure, could affect the substance of a defendant's strategic choices and communications.<sup>145</sup> Alternatively, relevant conditions, such as a tendency to ramble, interrupt, or ask repetitive questions of a witness, could undermine the effectiveness of the defendant's execution of his chosen strategies or tactics.<sup>146</sup> Conditions in this camp relate to the effectiveness of a defendant's defense and performance at trial. These conditions may or may not relate to a defendant's mental illness.

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141. See *Johnston*, *supra* note 4, at 585–86.

142. For example, a defendant may lack the ability to sustain mental organization, maintain concentration or attention, make decisions within a short timeframe, process new information and adapt positions accordingly, or withstand the stress likely to accompany trial participation. The *Edwards* Court alluded to some of these elements. See *Edwards*, 128 S. Ct. at 2387 (citing Brief for Am. Psychiatric Ass'n et al., *supra* note 32, at 26).

143. See DSM-5, *supra* note 128, at 163 (detailing psychomotor changes associated with major depressive disorder).

144. See *People v. Gardner*, 480 Cal. Rptr. 3d 528, 535–36 (Ct. App. 2014).

145. See *State v. Imani*, 786 N.W.2d 40, 54 (Wis. 2010) (finding a defendant incompetent to proceed pro se where he possessed a tenth-grade education, asserted without more that he read at a college level, and had merely an “observational” experience with the criminal court system); *Pickens v. State*, 292 N.W.2d 601, 611 (Wis. 1980); *State v. Jackson*, 867 N.W.2d 814, 824 (Wis. Ct. App. 2015) (affirming a finding of representational incompetence on the grounds that the defendant “did not demonstrate any ability to prepare” for trial, lacked an understanding of certain trial procedure, and failed to demonstrate a readiness to argue two pending motions).

146. See *In re J.G.*, Nos. 04-13-00825-CV, 04-13-00827-CV, 2014 WL 4627599, at \*3–4 (Tex. App. Sept. 17, 2014); *Chadwick v. State*, 309 S.W.3d 558, 562 (Tex. Crim. App. 2010).

The categories outlined above are necessarily rough, incomplete, and may overlap in places. They provide useful fodder, however, with which to examine when, and under which conditions, a state may deny self-representation to a defendant on the basis of a communication problem consistent with the Sixth Amendment and Due Process Clause.

## II. RELATIONSHIP OF COMMUNICATION TO REPRESENTATIONAL COMPETENCE

Neither courts nor commentators have scrutinized the extent to which various kinds of communication impairments could, or should, serve as grounds for representational incompetence. To answer this complicated question, it is necessary to articulate and defend a normative theory of representational competence and to examine the confines of the Sixth Amendment right to self-representation. On both scores, close examination of relevant U.S. Supreme Court precedent is critical.

### A. Normative Conception of Representational Competence

Competence is ultimately a legal and moral judgment, not an objective, clinically measurable reality.<sup>147</sup> Therefore, normative considerations must guide the selection and rejection of abilities for inclusion in a representational competence standard.<sup>148</sup> Self-representation by a marginally competent defendant recognizes and promotes the autonomy of the defendant while potentially impairing the reliability of the adjudication, the actual and apparent fairness of the proceeding, and the perceived legitimacy of the criminal justice process.<sup>149</sup> A representational competence standard should reflect a proper balancing of these values and interests. To the extent a criterion is unnecessary to achieve these interests—and its inclusion would result in withholding a valued right on unjustifiable grounds—that element should be removed from the competency standard. Analysis of *Faretta v. California*, *McKaskle v. Wiggins*,<sup>150</sup> and *Indiana v. Edwards* reveals that autonomy remains the predominant value in representational competence, while accuracy and fairness assume positions of lesser importance.

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147. See Bonnie, *supra* note 52, at 540 n.1; see also *id.* at 601 (“Whether a defendant fails to ‘appreciate’ the nature and consequences of the decision or lacks the capacity to make a ‘reasoned choice’ is, of course, not a clinical ‘fact,’ but rather a thick value judgment anchored in intuitions about individual autonomy and social obligation.”).

148. See, e.g., Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAV. SCI. & L. 291, 298 (1992); Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 PSYCHOL. PUB. POL’Y & L. 6, 31 (1995).

149. See *Indiana v. Edwards*, 554 U.S. 164, 176–77 (2008).

150. 465 U.S. 168 (1984).



## 1. Predominance of Autonomy

Autonomy animates the right to self-representation.<sup>151</sup> In *Faretta*, the Supreme Court derived the right to self-representation from our nation's history,<sup>152</sup> the text of the Sixth Amendment,<sup>153</sup> and "that respect for the individual which is the lifeblood of the law."<sup>154</sup> The *Faretta* Court stressed the importance of three aspects of autonomy. First, the Court emphasized "the inestimable worth of free choice."<sup>155</sup> Allowing a defendant to control his defense honors the dignity and individualism of the defendant.<sup>156</sup> The Court opined:

To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms . . . [and] to imprison a man in his privileges and call it the Constitution.<sup>157</sup>

Because a defendant will suffer the consequences of a conviction, he must be free to decide whether representation is to his advantage.<sup>158</sup> This choice, while often misguided,<sup>159</sup> must be honored out of esteem for the individual and respect for his inherent right of self-determination.<sup>160</sup> This principle, which the Court linked to the Founders' conception of natural law,<sup>161</sup> manifests in "a nearly universal conviction . . . that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so."<sup>162</sup>

Second, *Faretta* recognized that allowing a defendant to control his defense is critical to "the substance of an accused's position before the

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151. See *McKaskle*, 465 U.S. at 178 ("[T]he right to appear pro se exists to affirm the accused's individual dignity and autonomy."); *Faretta*, 422 U.S. at 834; *Bribiesca v. Galaza*, 215 F.3d 1015, 1020 (9th Cir. 2000) ("At its heart, the rule expounded by the Supreme Court in *Faretta* is a rule protecting individual autonomy.").

152. *Faretta*, 422 U.S. at 812–17, 826–32.

153. *Id.* at 818–26.

154. *Id.* at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)).

155. *Id.*

156. See *McKaskle*, 465 U.S. at 176–77 ("The right to appear pro se exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense. . . . In determining whether a defendant's *Faretta* rights have been respected, the primary focus must be on whether the defendant had a fair chance to present his case in his own way.").

157. *Faretta*, 422 U.S. at 815 (quoting *Adams v. United States ex rel.*, 317 U.S. 269, 279–80 (1942)).

158. *Id.* at 819, 834.

159. See *id.* at 832–33 & n.43. But see Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 427–28, 447 (2007) (finding that pro se defendants are convicted at rates equal to or lower than their represented counterparts).

160. See *Faretta*, 422 U.S. at 834.

161. *Id.* at 830 n.39 ("The Founders believed that self-representation was a basic right of a free people. Underlying this belief was not only the anti-lawyer sentiment of the populace, but also the 'natural law' thinking that characterized the Revolution's spokesmen.").

162. *Id.* at 817.

law.”<sup>163</sup> In essence, the Court recognized a defendant’s ability to respond to the prosecution on his own terms, in his own way.<sup>164</sup> The Court rejected the coercive power of the government to haul a person into court, force a government-selected and government-funded lawyer upon him, and authorize that lawyer to override the strategic positions of the defendant.<sup>165</sup> Indeed, self-representation is the means of last resort for a defendant wanting to make strategic decisions with which his attorney disagrees. When a defendant is represented, his counsel holds the authority to make binding decisions of strategy and tactics.<sup>166</sup> In cases recognizing this authority, courts stress that, if a defendant is determined to proceed in a manner contrary to that preferred by his attorney, he can always release his attorney and proceed pro se.<sup>167</sup> A pro se defendant, on the other hand, has no other options. If a court rejects his motion to represent himself, the defendant has no recourse and must relinquish control over his preferred means of defense.<sup>168</sup>

Third, effectuating a defendant’s rejection of counsel is a necessary correlate of the agency relationship that binds client to counsel.<sup>169</sup> Familiar

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163. *Id.* at 815 (quoting *Adams*, 317 U.S. at 279). In *McKaskle*, the Supreme Court elaborated upon the defendant’s right to control his defense. *See infra* notes 218–21.

164. *See Faretta*, 422 U.S. at 815; *see also id.* at 818 (“The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense.”); *id.* at 819–20 (“Although not stated in the Amendment in so many words, the right to self-representation—to make one’s own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.”); *id.* at 821 (“An unwanted counsel ‘represents’ the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense.”); *id.* at 834 (“The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction.”).

165. *See id.* at 807, 820, 833, 834.

166. *See Gonzales v. United States*, 553 U.S. 242, 248 (2008). Under current case law, a defendant can control the strategy and tactics of his case only when he forgoes assistance of counsel. *See id.*; *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Otherwise, counsel has the authority to select, over a defendant’s objection, which witnesses to call, which witnesses to cross-examine, what evidence to admit, and to make other tactical decisions, including possibly which defense to exert. *See Gonzales*, 553 U.S. at 248. Ethical rules do not provide clear guidance on whether a lawyer should follow his client’s directives regarding strategy. *See Martin Sabelli & Stacey Leyton, Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. CRIM. L. & CRIMINOLOGY 161, 182–85 (2000).

167. *See Jones*, 463 U.S. at 751 (explaining that a defendant only has authority to make “certain fundamental decisions,” and suggesting that, if he wants additional control, he could “elect to act as his or her own advocate”).

168. However, even a represented defendant retains control over remaining silent or testifying. In addition, many courts have recognized a defendant’s right to decide whether to raise an insanity defense. *See CHRISTOPHER SLOBOGIN, MINDING JUSTICE* 211–12 (2006).

169. *See James A. Cohen, Lawyer Role, Agency Law, and the Characterization “Officer of the Court”*, 48 BUFF. L. REV. 349, 399 (2000) (“The attorney-client relationship is created in the same way as all agency relations, by agreement.”); Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 NEB. L. REV. 346, 352 (2007) (“Attorneys generally have been viewed as

black letter law holds that an agent cannot bind the principal unless the principal implicitly or explicitly has consented to the contours of the representation.<sup>170</sup> Within this paradigm, the defendant is the principal, and his attorney (his agent) only serves with his assent. The *Faretta* Court declared that counsel “shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.”<sup>171</sup> Otherwise, “counsel is not an assistant, but a master.”<sup>172</sup> In this vein, the Court explained the traditional allocation of most trial decisions to counsel as premised on “the defendant’s consent, at the outset, to accept counsel as his representative.”<sup>173</sup> By definition, if a defendant withholds consent, then his attorney lacks the authority to speak for him, and the defendant should not be bound by the attorney’s strategic and tactical choices.<sup>174</sup>

Respecting the autonomy of an individual is especially crucial within the context of a criminal trial where the stakes are high, the proceedings are public, and decisions are likely to be of great personal value.<sup>175</sup> A criminal trial may be the most important event in a person’s life. The outcome of a criminal trial holds profound consequences for the defendant, potentially affecting his liberty, personal relationships, status in the community, current and future employment prospects, and personal identity. Critically, a defendant—particularly, perhaps, one who is likely to exercise his right to self-representation—may have goals besides that of securing an acquittal or the lightest sentence possible.<sup>176</sup> The defendant may wish to assert a

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independent contractor agents. Clients do not control the physical actions of attorneys, but they do authorize attorneys to act for them. Thus, attorneys are not servants, but agents.”); cf. Robert J. Condlin, “What’s Love Got To Do With It?”—“It’s Not Like They’re Your Friends for Christ’s Sake”: *The Complicated Relationship Between Lawyer and Client*, 82 NEB. L. REV. 211, 306–11 (2003) (arguing that lawyers are most properly conceptualized as a “friendly” fiduciary or agent); Adam Liptak, *Foreword: Agency and Equity: Why Do We Blame Clients for Their Lawyers’ Mistakes?*, 110 MICH. L. REV. 875 (2012) (arguing that clients and lawyers fit the agency model imperfectly).

170. See 3 AM. JUR. 2d Agency § 14 (2016); see also *id.* § 15 (discussing express or implied agency).

171. *Faretta*, 422 U.S. at 820.

172. *Id.*; see also *id.* at 821 (“An unwanted counsel ‘represents’ the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense.”).

173. *Id.* at 820–21.

174. See *Indiana v. Edwards*, 554 U.S. 164, 188 (2008) (Scalia, J. dissenting); *Gonzales v. United States*, 553 U.S. 242, 254 (2008) (Scalia, J., concurring) (noting that “action taken by counsel over his client’s objection . . . would have the effect of revoking the agency with respect to the action in question”); cf. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633–34 (1962) (“Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.”).

175. See Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 337 (1987).

176. See Douglas Mossman & Neal W. Dunseith, Jr., “A Fool for a Client”: *Print Portrayals of 49 Pro Se Criminal Defendants*, 29 J. AM. ACAD. PSYCHIATRY & L. 408, 414

particular right, even when his attorney believes the legal argument has little merit.<sup>177</sup> He may prefer a guilty verdict to the stigma of being labeled insane.<sup>178</sup> He may want to use his “day in court” to express a certain political view.<sup>179</sup> He may opt for a term of imprisonment over implicating friends or family, endangering important personal relationships, jeopardizing his status in the community, or violating his personal moral code.<sup>180</sup> Attorneys assigned to represent defendants with such preferences may reject their clients’ wishes as contrary to their best interests.<sup>181</sup> But, “[a]s John Stuart Mill has observed, the individual is the one most interested in his well-being and is the most knowledgeable about his feelings, values, priorities, and circumstances.”<sup>182</sup>

## 2. Importance of Accuracy and Fairness

While the interest of autonomy is paramount to self-representation, the U.S. Supreme Court in *Edwards* recognized that competing values may warrant overriding a defendant’s decision to proceed without counsel even

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(2001) (characterizing defendants’ reasons for wanting to represent themselves as eccentric, ideological, and personal); *infra* note 179.

177. See *Nelson v. California*, 346 F.2d 73, 81 (9th Cir. 1965) (holding that an attorney may waive the client’s right to assert a defense based on the Fourth Amendment over his objection).

178. See Anne C. Singer, *The Imposition of the Insanity Defense on an Unwilling Defendant*, 41 OHIO ST. L.J. 637, 637–39, 637 n.2 (1980) (listing the “onerous consequences” that may attend a successful insanity defense); Sabelli & Leyton, *supra* note 166, at 192–93.

179. See *United States v. Robertson*, 430 F. Supp. 444, 447 (D.D.C. 1977) (quoting the defendant as rejecting an insanity defense “for personal reasons of a quasi-political nature”); Hashimoto, *supra* note 159, at 473–75 (revealing that pro se defendants may be more likely to be charged with crimes that lend themselves to ideological defenses and to exert such defenses); Mossman & Dunseith, *supra* note 176, at 414 (describing defendants whose self-representation reflected larger ideological issues); Phillip J. Resnick, *The Political Offender: Forensic Psychiatric Considerations*, 6 BULL. AM. ACAD. PSYCHIATRY & L. 388, 391 (1978).

180. See David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 455–57, 457 n.3 (describing cases in which defendants prioritized the maintenance of relationships or consistency with their “personal code of honor” over acquittal or large settlements).

181. See *id.* at 487–88 & n.79 (observing that “[a]ttorneys are trained in skills almost exclusively concerned with attaining maximizing ends” such as the shortest sentence or the largest judgment). An attorney’s inability to identify accurately his client’s values and interests may be particularly acute when the client is mentally ill. Professor Michael Perlin has argued that “sanism,” an irrational prejudice against the mentally ill on par with other biases such as homophobia, pervades criminal justice jurisprudence and lawyering. See MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* 21–24, 48–58 (2000).

182. See Johnston, *supra* note 4, at 535 (“He is the person most interested in his own well-being: the interest which any other person, except in cases of strong personal attachment, can have in it, is trifling, compared with that which he himself has; the interest which society has in him individually (except as to his conduct to others) is fractional, and altogether indirect: while with respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by any one else.” (citing JOHN STUART MILL, *ON LIBERTY* 45 (Peoples ed. 1859), in *ON LIBERTY, REPRESENTATIVE GOVERNMENT, THE SUBJECTION OF WOMEN* 5, 94 (Oxford Univ. Press World’s Classics ed. 1946))).

when he is competent to stand trial. In particular, the Court suggested that a trial court could deny a motion for self-representation when “a defendant’s lack of capacity threatens an improper conviction or sentence” or risks an actual or apparently unfair trial.<sup>183</sup> The *Edwards* Court did not advise how lower courts should weigh these interests against the value of a defendant’s autonomy.<sup>184</sup> However, the relative weight of these values may be discerned by the Court’s affirmance of *Faretta* and the relation between the values espoused by *Edwards* and the questionable capacity of a gray-area defendant with serious mental illness to exercise meaningful autonomy.<sup>185</sup>

The values endorsed in *Edwards*—accuracy of verdicts, propriety of sentences, fairness of trials, and trials that appear fair to observers—are often issues collateral to a defendant’s autonomy. The Court’s concern in *Edwards* regarded the “mental capacities” of defendants who “suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.”<sup>186</sup> Ahmad Edwards offered a perfect test case: he suffered from schizophrenia, a severe, chronic mental illness characterized by delusions and sometimes disorganized communication.<sup>187</sup> While trial courts not uncommonly find individuals with schizophrenia competent to stand trial,<sup>188</sup> such a defendant may lack the decisional abilities necessary to render autonomous, self-interested choices in the context of self-representation.<sup>189</sup> For instance, an individual plagued by disordered thinking may be unable to gather information to evaluate the state’s case,<sup>190</sup> generate alternative courses of action,<sup>191</sup> or maintain mental

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183. *Indiana v. Edwards*, 554 U.S. 164, 176–77 (2008). In addition, the Court asserted that allowing a borderline-competent defendant to represent himself would not be respectful of his autonomy because the representation could result in a “humiliating” spectacle. *Id.* at 176. While Justice Scalia forcibly and effectively responded to the majority’s concern, *id.* at 186–87 (Scalia, J., dissenting), Richard Bonnie has framed the argument slightly differently in asserting that a defendant’s incompetence jeopardizes the moral dignity of the trial process. See Richard J. Bonnie, *The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense*, 81 J. CRIM. L. & CRIMINOLOGY 426–27 (1990).

184. The Court in *Edwards* did not analyze whether Mr. Edwards was capable of exercising meaningful autonomy, as questions of fact are beyond the Court’s purview. The Court did indicate its interest in a defendant’s powers of understanding, reasoning, and appreciation, however, and linked them to his ability to “carry out the basic tasks needed to present his own defense without the help of counsel.” See *Edwards*, 554 U.S. at 175–176; see also *infra* notes 237–60.

185. *Edwards*, 554 U.S. at 178 (rejecting petitioner Indiana’s request to overrule *Faretta* and abstaining from criticizing the rationale of *Faretta* or questioning its emphasis on autonomy).

186. *Id.*

187. DSM-5, *supra* note 128, at 87–90, 99–101.

188. See, e.g., *Edwards*, 554 U.S. at 169; *United States v. Caraza*, 843 F.2d 432 (11th Cir. 1988); *United States v. Simmons*, 993 F. Supp. 168 (W.D.N.Y. 1998).

189. For a representational competence standard consisting largely of decisional abilities, see Bonnie, *supra* note 52, at 556–57, 571–72, 579. See also Johnston, *supra* note 4, at 541–92; Marks, *supra* note 4, at 847; Slobogin, *supra* note 4, at 410.

190. See Johnston, *supra* note 4, at 553–56 (defining and discussing the importance of problem definition and formulation for representational competence).

191. See *id.* at 557–61 (discussing the importance of generating alternatives for representational competence).

organization.<sup>192</sup> In these situations, a defendant's actions and communications at trial may not reflect a meaningful exercise of self-determination. To the extent that a defendant is incapable of engaging in autonomous decision making, he does not possess a cognizable autonomy interest.<sup>193</sup> It is also in these situations when concerns about the fundamental fairness of a trial and the accuracy of a verdict are most acute, because the defendant is least likely to be capable of effectively challenging the government's case. The language used in *Edwards* to couch its solicitousness about fairness reflects this understanding.<sup>194</sup> This conclusion is also buttressed by the *Edwards* Court's observation that risks of an improper conviction may be restricted to those pro se defendants of questionable competency to stand trial.<sup>195</sup> In such cases, concerns exist as to the defendant's understanding of the nature and purpose of the criminal process, appreciation of his situation as a criminal defendant, or capacity to recognize and relate relevant information to his attorney.<sup>196</sup>

Furthermore, *Edwards*, *Faretta*, and *McKaskle* indicate that concerns about the ultimate reliability of a conviction should rarely override the knowing and intelligent choice of a defendant to proceed pro se. *Edwards* characterized as "exceptional" a denial of self-representation by a defendant capable of effecting a valid waiver of counsel<sup>197</sup> because of concern over an improper conviction or sentence.<sup>198</sup> This characterization accords with *Faretta*, where the Court held that, when a defendant is capable of meaningful autonomy,<sup>199</sup> concern for the reliability of the verdict must give way to honoring the defendant's desire to control his defense.<sup>200</sup> Thus, the

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192. See *id.* at 585 (discussing the importance of maintaining mental organization for representational competence).

193. See E. Lea Johnston, *Setting the Standard: A Critique of Bonnie's Competency Standard and the Potential of Problem-Solving Theory for Self-Representation at Trial*, 43 U.C. DAVIS L. REV. 1605, 1661–63 (2010); Christopher Slobogin & Amy Mashburn, *The Criminal Defense Lawyer's Fiduciary Duty to Clients with Mental Disability*, 68 FORDHAM L. REV. 1581, 1586–87 (2000) (explaining the relationship between incompetence and autonomy).

194. See *Indiana v. Edwards*, 554 U.S. 164, 177 (2008) (referencing two examples of "insane" men who attempt to represent themselves as exemplifying the concern for fairness and the appearance of fairness).

195. See *id.* at 178.

196. See *Bonnie*, *supra* note 52, at 562–63. Thus, one could argue that a court should reevaluate competency to proceed once a mentally ill defendant indicates he wants to proceed pro se. I appreciate this observation from Chris Slobogin.

197. *Edwards*, 554 U.S. at 176–77, 183 (Scalia, J., dissenting) (noting that there was "no dispute" that Edwards effected a valid waiver of his right to counsel).

198. *Id.* ("Moreover, insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial.").

199. See *Faretta v. California*, 422 U.S. 806, 835 (1975) (noting that Faretta was "literate, competent, and understanding, and that he was voluntarily exercising his informed free will").

200. See *id.* at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)); see also *Bonnie*, *supra* note 52, at 558 ("*Faretta* holds, in effect, that autonomy can trump reliability.").

value of accuracy is typically subordinate in importance to respect for a defendant's autonomy.<sup>201</sup>

Weighing the relative importance of the competing values at stake in self-representation, one defensible normative conception of representational competence is this: a court should allow a defendant capable of autonomous decision making to control his defense unless the self-representation poses a *grave threat* to the reliability, fairness, or integrity of the adjudication.<sup>202</sup> While other normative formulations may be plausible,<sup>203</sup> this standard reflects the clear importance of autonomy to the pro se right, *Edwards's* reassurance that *Faretta* and its underlying rationale remain good law,<sup>204</sup> and *Edwards's* desire to shield certain mentally disordered defendants from demonstrably unfair or unreliable results.<sup>205</sup> This normative theory dictates that decisional or functional abilities should only be required if one of two criteria is met. First, representational competence should require those decisional capacities necessarily present for the exercise of meaningful autonomy.<sup>206</sup> Second, a representational competence standard should include a functional ability if its absence poses a grave threat to the reliability or the actual or apparent fairness of the adjudication.

#### *B. Supreme Court Guidance on Communication and Self-Representation*

Before applying this normative theory to communication inadequacies, it is necessary to explore what the Supreme Court has said—or hinted—about the importance of communication and performance to self-representation. Such language provides crucial guidance as to the contours of the self-representation right and which components of representational competence will survive constitutional scrutiny. In essence, this examination helps to expose the amorphous line between cognizable impairments of expression and noncognizable (and expected) poor performance by pro se defendants at trial. Notably, the analysis also reveals the Court's conception of self-representation as a bundle of rights, with distinct rights of control and execution. This conceptualization potentially holds profound consequences for the constitution of representational competence.

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201. See *Flanagan v. United States*, 465 U.S. 259, 268 (1984) (“[T]he [*Faretta*] right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding.”).

202. Johnston, *supra* note 193, at 1614, 1626, 1656, 1661.

203. See *id.* at 1660–61.

204. *Indiana v. Edwards*, 554 U.S. 164, 178 (2008).

205. *Id.*

206. See Luban, *supra* note 180, at 465–66.

1. Clues from *Faretta*

In *Faretta*, the defendant was competent both to control and conduct his defense.<sup>207</sup> Accordingly, the Court had no reason to probe the components of representational competence. *Faretta* indicates, however, that, so long as a defendant's decision to proceed pro se is informed, his ability to conduct his defense should be irrelevant to his representational competence.<sup>208</sup> *Faretta* clearly demonstrates the importance of decision-making abilities for an individual's competence to proceed pro se. For instance, in noting that the defendant was competent, the Court stressed that "he was voluntarily exercising his informed free will."<sup>209</sup> This language suggests that the competence inquiry should include whether the defendant possesses those attributes requisite to meaningful autonomy, including the abilities to identify his best interests and reach rational decisions that advance those interests.<sup>210</sup> Similarly, the Court stated that a defendant should be entitled to a choice of procedure "in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice."<sup>211</sup> The Court's requirement of a knowing and voluntary waiver also illustrates the significance of a rational decision-making process.<sup>212</sup>

Significantly, the *Faretta* Court warned lower courts not to hold pro se defendants to exacting technical or performance standards. The Court emphasized that "a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation"<sup>213</sup> and that, "although he may conduct his own defense ultimately to his own detriment, his choice must be honored."<sup>214</sup> Additionally, the Court found that the defendant's "technical legal knowledge" was irrelevant to the pro se inquiry.<sup>215</sup> Therefore, while the Court did not directly address the subject of representational competence in *Faretta*, its language and focus on autonomy suggest the centrality of a

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207. See *Faretta v. California*, 422 U.S. 806, 835 (1975) ("The record affirmatively shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will.").

208. See *id.* at 835–36.

209. *Id.* at 835.

210. See *id.*; cf. *Godinez v. Moran*, 509 U.S. 389 (1993) (stressing the importance of rational understanding to one's competence to waive the right to counsel and to plead guilty); *Dusky v. United States*, 362 U.S. 402 (1960) (stressing the importance of rational understanding to one's competence to stand trial).

211. *Faretta*, 422 U.S. at 815 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279–80 (1942)).

212. See *id.* at 835 (holding that, to represent oneself, one must "knowingly and intelligently" forgo the benefits of counsel (citation omitted)); cf. *Godinez*, 509 U.S. at 401 & n.12 (stressing that "there is a 'heightened' standard for . . . waiving the right to counsel, but it is not a heightened standard of competence").

213. *Faretta*, 422 U.S. at 835 (quoting *Adams*, 317 U.S. at 279).

214. *Id.* at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)).

215. *Id.* at 836.



defendant's decision-making abilities and the immateriality of his technical knowledge, skills, experience, and performance abilities.<sup>216</sup>

## 2. *McKaskle*: Differentiation of Control from Performance

*McKaskle v. Wiggins* demonstrates that trial courts should treat a defendant's ability to control his defense separately from his ability to perform it. In *McKaskle*, the Supreme Court conceptualized self-representation as a bundle of "certain specific rights to have [one's] voice heard."<sup>217</sup> The first specific right—"the core of the *Faretta* right"—involves control over the organization and content of the case the defendant chooses to present.<sup>218</sup> Control over one's case includes the ability to make all significant strategic and tactical decisions for the defense, including which defense to exert and choices concerning the questioning of witnesses.<sup>219</sup> Control over defense decisions is necessary to effectuate the "primary focus" of the *Faretta* right, which the Court identified as allowing a defendant "a fair chance to present his case in his own way."<sup>220</sup> The Court expressly allocated the right of decisional control to the pro se defendant.<sup>221</sup>

*McKaskle* also recognized that self-representation involves a right of execution or performance. This right is more complicated because multiple individuals may speak for the defense.<sup>222</sup> As a general matter, the defendant has an "affirmative right to participate"<sup>223</sup> in his defense and "to appear on stage at his trial."<sup>224</sup> The Court elaborated that a pro se defendant "must be allowed . . . to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial."<sup>225</sup> Thus, in addition to a right of control, the pro se defendant has broad (and perhaps unlimited) rights of participation.

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216. Indeed, numerous appellate courts since *Faretta* have overturned denials of self-representation based on lack of technical knowledge. See, e.g., *United States v. Peppers*, 302 F.3d 120, 134 (3rd Cir. 2002); *Vanisi v. State*, 22 P.3d 1164, 1171–72 (Nev. 2001); *United States v. Hernandez*, 203 F.3d 614 (9th Cir. 2000).

217. *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984); *id.* at 177 ("The specific rights to make his voice heard that Wiggins was plainly accorded . . . form the core of a defendant's right of self-representation.").

218. *Id.* at 178 ("First, the pro se defendant is entitled to preserve actual control over the case he chooses to present to the jury."); *id.* at 174 ("The pro se defendant must be allowed to control the organization and content of his own defense.").

219. *Id.* at 178. As to any matter that would normally be left to the defense's discretion, a judge must resolve any dispute between a defendant and his standby counsel in the defendant's favor. *Id.* at 181.

220. *Id.* at 177 ("The specific rights to make his voice heard . . . form the core of a defendant's right of self-representation.").

221. See *id.* at 174.

222. *Id.* at 177.

223. *Id.*

224. *Id.* at 187.

225. *Id.* at 174.

However, this affirmative participation right does not comprehend an ability to prevent standby counsel from also participating in a pro se defendant's trial.<sup>226</sup> The Court emphasized:

[N]o absolute bar on standby counsel's unsolicited participation is appropriate or was intended. The right to appear pro se exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense. Both of these objectives can be achieved without categorically silencing standby counsel.<sup>227</sup>

Thus, while a pro se defendant has the exclusive right to control his defense, a trial court may force him to share the execution of his defense with standby counsel.<sup>228</sup> The Court cabined stand-by counsel's unwanted participation with several limitations, however. It directed that standby counsel may not "speak *instead* of the defendant on any matter of importance."<sup>229</sup> When standby counsel participates over the objection of a pro se defendant, a *Faretta* violation will depend on the defendant's loss of actual or apparent control over her case.<sup>230</sup> In addition, to safeguard the dignity and autonomy of the pro se defendant, a trial court must not allow unwanted participation by standby counsel "to destroy the jury's perception that the defendant is representing himself."<sup>231</sup> This limitation preserves "the message the defendant wishes to convey," despite multiple voices speaking for the defense.<sup>232</sup>

### 3. Exegesis of *Edwards*

*Edwards* certainly evidences concern for a defendant's expressive abilities,<sup>233</sup> but an exegesis of this case reveals its dominant concern for decisional impairment. The Court observed that "[d]isorganized thinking, . . . impaired expressive abilities, . . . and other common symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation even if

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226. *See id.* at 176–77, 187–88.

227. *Id.* at 176–77.

228. In *McKaskle*, for instance, petitioner Wiggins maintained control over all significant strategic and tactical decisions, *see id.* at 186, but both Wiggins and his stand-by counsel actively participated in the defense, *see id.* at 172–73, 180–81, 184–86; *see also id.* at 190–91 (White, J., dissenting).

229. *Id.* at 178 (majority opinion). The right of a pro se defendant to control his case applies during the entirety of the trial process and does not depend on the jury's presence. *See id.* at 179; *infra* note 230.

230. *McKaskle*, 465 U.S. at 178. In proceedings outside the presence of the jury, no *Faretta* violation will occur so long as a trial court permits a pro se defendant to address the court freely, and the court resolves all strategic and tactical disagreements in the defendant's favor. *Id.* at 179. In the presence of the jury, no violation occurs when standby counsel simply assists the pro se defendant in complying with evidentiary rules and rules of courtroom protocol and procedure. *See id.* at 183; *see also id.* at 184.

231. *Id.* at 178.

232. *Id.* at 177.

233. *See supra* notes 31, 33 and accompanying text.

he can play the lesser role of represented defendant.”<sup>234</sup> The Court cited defendant Edwards’s nonsensical motions, which reflected his disorganized thinking, as exemplifying this truism.<sup>235</sup> Other aspects of the Court’s opinion also suggest that communicative difficulties should matter primarily—if not solely—to the extent they indicate cognitive deficits or an absence of autonomy. In particular, the important relationship between autonomy and expressive ability is revealed in the Court’s description of the capacities relevant to representational competence, the sources it selected to support and illustrate the competence needed to perform basic trial tasks, and the signals it used to indicate the import of those sources of authority.

The Court expressly tethered necessary trial tasks to decision-making abilities of a higher order than those required to stand trial. In language that has now been repeated by state supreme courts around the nation,<sup>236</sup> the Court stated:

In certain instances an individual may well be able to satisfy *Dusky*’s mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel.<sup>237</sup>

This sentence is immediately followed by a citation to *Adjudicative Competence: The MacArthur Studies* by Norman Poythress, Richard Bonnie, John Monahan, Randy Otto, and Steven Hoge<sup>238</sup> and a list of certain cognitive abilities. The Court utilized a “*see, e.g.*,” signal before its citation to the MacArthur text,<sup>239</sup> signifying that the cited authority clearly supports the proposition.<sup>240</sup>

*Adjudicative Competence: The MacArthur Studies* examines Professor Bonnie’s conceptual model of adjudicative competence and summarizes relevant research of the MacArthur Foundation Research Network on Mental Health and the Law.<sup>241</sup> In a series of articles in the early 1990s,<sup>242</sup> Bonnie suggested that adjudicative competence—or competence to participate in one’s defense—should be disaggregated into two concepts: a foundational concept of competence to assist counsel<sup>243</sup> and a context-dependent concept of decisional competence.<sup>244</sup> Bonnie suggested that all

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234. *Indiana v. Edwards*, 554 U.S. 164, 176 (2008) (quoting Brief for Am. Psychiatric Ass’n et al. as Amici Curiae, *supra* note 32).

235. *Id.* at 176 app.

236. *See, e.g.*, *State v. Baumruk*, 280 S.W.3d 600, 609–10 (Mo. 2009) (en banc); *State v. Lane*, 707 S.E.2d 210, 219 (N.C. 2011).

237. *Edwards*, 554 U.S. at 175–76.

238. *See id.* at 176 (citing POYTHRESS ET AL., *supra* note 29, at 103).

239. *Id.* at 175–76.

240. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R.1.2(a), at 58–59 (Columbia Law Review Ass’n et al. eds., 20th ed. 2015) [hereinafter THE BLUEBOOK] (explaining the significance of the “*see, e.g.*” source in this way: “Use e.g., in combination with see to introduce an authority that is one of multiple authorities . . . to clearly support the same proposition”).

241. POYTHRESS ET AL., *supra* note 29, at 56–57 (describing Bonnie’s conceptual model).

242. *See Bonnie, supra* note 52; *Bonnie, supra* note 148; *Bonnie, supra* note 183, at 419.

243. *See Bonnie, supra* note 52, at 554–55, 561–67.

244. *See id.* at 554–56, 567–87.

defendants must possess competence to assist counsel, while only those defendants called upon to make decisions during an adjudication must possess decisional competence.<sup>245</sup> Competence to assist counsel, according to Bonnie, requires the capacities to understand the nature and purpose of the criminal process, appreciate one's potential jeopardy, and identify and communicate relevant information to counsel.<sup>246</sup> Decisional competence, on the other hand, includes those abilities required for legally valid decision making.<sup>247</sup>

Bonnie proposed a number of tests for decisional competence that vary by the decision at issue and whether the defendant's decision is in accord with counsel's advice.<sup>248</sup> In order to waive counsel and proceed pro se, Bonnie argued that a defendant should possess the capacity to make reasoned choices.<sup>249</sup> He defined this standard of decisional competence to include the following functional elements: expression of choice, understanding of factual information, appreciation of that information for the defendant's own case, and rational manipulation of information.<sup>250</sup> In essence, Bonnie proposed that, to waive counsel, a defendant should be capable of using logical processes to compare the benefits and risks of options in a decisional framework free of delusional beliefs or pathological emotions.<sup>251</sup> I have argued elsewhere that, while Bonnie's framework is groundbreaking and important, his proposed standard for waiver of counsel is insufficient for the specific context of self-representation and that the standard should include a broader set of problem-solving abilities.<sup>252</sup>

Regardless, the U.S. Supreme Court signaled its endorsement of Bonnie's framework of adjudicative competence and, perhaps, that the decisional competence standard that he suggested should be necessary for self-representation. In particular, the Court quoted the MacArthur work for the proposition that "[w]ithin each domain of adjudicative competence (competence to assist counsel; decisional competence) the data indicate that understanding, reasoning, and appreciation [of the charges against a defendant] are separable and somewhat independent aspects of functional legal ability."<sup>253</sup> In this way, the Court recognized that cognitive abilities of a higher order are necessary for representational competence than to stand trial. This language also communicates that if a defendant lacks these decisional capacities—and, by implication, only such capacities—he will be "unable to carry out the basic tasks needed to present his own defense without the help of counsel."<sup>254</sup>

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245. *See id.* at 548, 568.

246. *Id.* at 562–63.

247. *Id.* at 548.

248. *See id.* at 576–80.

249. *See id.* at 579. Bonnie acknowledged that self-representation at trial may require additional abilities related to performance. *See id.* at 557 n.68.

250. *See id.* at 571–72.

251. *See id.* at 574–75.

252. *See Johnston, supra* note 193.

253. *Indiana v. Edwards*, 554 U.S. 164, 176 (2008) (citation omitted).

254. *Id.* at 175–76.

Further, directly after its reference to decisional competence and component cognitive elements, the Court cited *McKaskle* and listed the trial tasks that a pro se defendant should be competent to perform.<sup>255</sup> These tasks include “organization of defense, making motions, arguing points of law, participating in voir dire, questioning witnesses, and addressing the court and jury.”<sup>256</sup> Significantly, the Court selected a “*see also*” signal to precede this authority.<sup>257</sup> According to the *The Bluebook: A Uniform System of Citation*, the “*see also*” signal “is commonly used to cite an authority supporting a proposition when authorities that state or directly support the proposition already have been cited or discussed.”<sup>258</sup> The Court’s use of the “*see, e.g.,*” signal for the MacArthur work directly followed by the “*see also*” signal for *McKaskle* indicates, though does not conclusively establish, that the former authority supports the Court’s proposition about representational competence and the need to ensure that a pro se defendant is able “to carry out the basic tasks needed to present his own defense” more directly than the latter authority.<sup>259</sup> These signals and the ordering of authorities also suggest that, in order to be competent to perform the trial tasks listed in *McKaskle*, the defendant must have sufficient decisional competence and cognitive abilities.<sup>260</sup>

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255. *Id.* at 176 (citing *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984)).

256. *Id.*

257. *Id.*

258. THE BLUEBOOK, *supra* note 240, R. 1.2(a), at 46 (“Cited authority constitutes additional source material that supports the proposition. ‘See also’ is commonly used to cite an authority supporting a proposition when authorities that state or directly support the proposition already have been cited or discussed.”); *see also* Ira P. Robbins, *Semiotics, Analogical Legal Reasoning, and the Cf. Citation: Getting Our Signals Uncrossed*, 48 DUKE L.J. 1043, 1073 (1999) (discussing implications of the “*see also*” signal).

259. *Edwards*, 554 U.S. at 175–76; THE BLUEBOOK, *supra* note 240, R. 1.2, at 5; *id.* R. 1.2(a), at 46. The U.S. Supreme Court utilizes its own citation manual, which includes signals. *See* Email from Todd Venie to E. Lea Johnston (June 4, 2015, 5:09 PM) (conveying the contents of an oral conversation with a librarian at the U.S. Supreme Court, who relayed that the Court does have a citation manual, maintained by the Reporter of Decisions, that defines signals, “and according to the librarian, the definitions of the signals are ‘similar to *The Bluebook*’s but not identical”). The Court does not make this manual available to the public, however. *Id.* (reporting that “the manual has an official designation of ‘for internal use only’ and it is neither published nor distributed to outside parties”). The Court’s internal manual is not susceptible to a request under the Freedom of Information Act. *See* 5 U.S.C. § 552 (2012) (providing the public the right to request access to records from any federal agency); 5 U.S.C. § 551(1)(B) (providing that “agency” does not include courts of the United States). Because the public will only have access to publicly available citation manuals—and *The Bluebook* is the most widely used legal citation manual, *see* DEBORAH E. BOUCHOUX, CITE-CHECKER: YOUR GUIDE TO USING THE BLUEBOOK 1 (3d ed. 2011) (“*The Bluebook* remains the gold standard for citation throughout the United States.”)—it makes sense to construe the meaning of signals in Supreme Court opinions by *The Bluebook*. *Cf.* Robbins, *supra* note 258, at 1058 (using *The Bluebook* as a means to explore the varying use of the “*cf.*” signal by courts, including the U.S. Supreme Court, and observing that “[i]n the bulk of cases, courts follow the definitions set out in successive editions of *The Bluebook* and attempt to construct analogies that represent positive authority for the proposition offered”).

260. An alternative reading, however, is that competence “to carry out the basic tasks needed to present his own defense without the help of counsel” consists both of decisional competence and performance competence, i.e., competence to actually perform the decisions

These observations support the notion that communication problems are relevant to representational competence to the extent that they expose or reflect disordered thinking or other deficits in decision-making, problem-solving, or cognitive abilities. To be clear, *Edwards* does not answer the question of whether a communication difficulty in an absence of cognitive deficiencies may support a denial of self-representation. That issue was simply not presented in *Edwards*.<sup>261</sup> *McKaskle*, in differentiating control from performance in self-representation, suggests that answer should be “no.”<sup>262</sup> *Faretta* is also consistent with this approach.<sup>263</sup>

### III. RAMIFICATIONS FOR REPRESENTATIONAL COMPETENCE STANDARDS

Applying the normative lens and the Supreme Court’s guidance on the scope of the self-representation right to the four categories of communication impairments outlined in Part I.D yields several conclusions relevant to the constitutionality of current state representational competence standards. A communication deficiency should support a finding of representational incompetence only to the extent that the deficiency either reveals an absence of meaningful autonomy or poses a grave threat to the reliability or the actual or apparent fairness of the adjudication. The four categories of communication deficiencies—involving disordered speech, an inability to be understood by courtroom actors, an inability to communicate in a timely fashion within the particular context of trial, and suboptimal advocacy—hold varying relationships to mental illness and cognitive impairment and thus offer differing implications for a defendant’s autonomous potential. They also differ in the extent to which they may be ameliorated by standby or hybrid counsel and so vary in their necessary relationship to the fairness or accuracy of an adjudication. After evaluating the constitutional significance of each subset of communication impairment, this part concludes by exploring the implications for existing state representational competence standards. It also proposes a two-part representational competence standard that coheres with Supreme Court precedent and the values animating representational competence.

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reached as to these trial tasks. See *Edwards*, 554 U.S. at 175–76. If the Court had wanted to list two distinct areas of functional competence that are both relevant to representational competence, however, then the clearest way to do so would have been to list *McKaskle* behind the McArthur Studies authority within the same “see, e.g.” signal. See THE BLUEBOOK, *supra* note 240, R. 1.2, at 58–59 (providing an example of the “see, e.g.” signal to introduce a series of authorities that each clearly support the same proposition with each authority separated by a semicolon). In addition, this alternative reading seems unreasonable in light of *Faretta*’s directive that trial courts should not demand strong advocacy skills when deciding whether to permit self-representation. See *Faretta v. California*, 422 U.S. 806, 836 (1975).

261. See *Edwards*, 554 U.S. at 176 app.

262. See *supra* Part II.B.2.

263. See *supra* Part II.B.1.

A. *Necessary Causal Predicate of Severe Mental Illness*

A critical threshold issue—which states have addressed in different ways<sup>264</sup>—is whether to limit cognizable deficiencies to those resulting from mental illness or “severe” mental illness. *Edwards* limited its holding to deficits that stem from severe mental illness and thus appears to require causation as an essential element of representational incompetence.<sup>265</sup> This requirement is not surprising: causation is one of the defining hallmarks of legal competency standards in civil and criminal contexts,<sup>266</sup> and most competency standards require that legally recognized deficiencies originate from mental illness or mental disability.<sup>267</sup> Indeed, some commentators have argued that depriving an individual of a constitutional right in the absence of mental impairment is unconstitutional.<sup>268</sup> Case law demonstrates that an individual’s underlying condition must be enduring and beyond his ability to alter or control.<sup>269</sup>

Moreover, limiting the legal recognition of incompetence to functional deficits stemming from mental disability accords due respect for a defendant’s autonomy. A fundamental tenet of mental health law is that “the legally relevant behavior of mentally disordered persons is a product of their mental disorder and not of their free choice.”<sup>270</sup> A state’s power to deprive an incompetent defendant of his Sixth Amendment right to control his defense—and to impose a substitute decision maker on the defendant—extends from its *parens patriae* authority.<sup>271</sup> Therefore, the justification for

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264. See *supra* notes 48–49, 124–25 and accompanying text.

265. See *Indiana v. Edwards*, 554 U.S. 164, 177–78 (2008) (“[T]he Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.”). Other language in the decision, however, is not as clear. For instance, the Court does not reject Indiana’s proposed standard of “coherent communication” as constitutionally impermissible for failing to include a mental illness or disability element. See *id.* at 178.

266. See THOMAS GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS* 29–32 (Kluwer Academic 2d ed. 2003); see also Stephen J. Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 539 (1978) (“The structure of all mental health laws is fundamentally the same: all require findings of (1) a *mental disorder*; (2) a *behavioral component*; and (3) a *causal connection* between the mental disorder and the behavioral component (at least in principle).”).

267. GRISSO, *supra* note 266, at 29.

268. See S. J. Anderer, *Development of an Instrument to Evaluate the Capacity of Elderly Persons to Make Personal Care and Financial Decisions* 7–8 (May 1997) (unpublished Ph.D. dissertation, Allegheny Univ. of Health Scis.) (on file with the Hahnemann Library, Drexel University); *id.* at 5 & n.24; see also *In re Conservatorship of Goodman*, 766 P.2d 1010, 1011–12 (Okla. Civ. App. 1988) (“If a purpose of the statute is to allow involuntary intervention in the property affairs of citizens, absent a finding of mental incompetence, it is unconstitutional as it is a clear violation of the State and Federal Constitutional provisions which guarantee every citizen the right to life, liberty and property.”); *State ex rel. Shamblin v. Collier*, 445 S.E.2d 736 (W. Va. 1994).

269. See Jennifer Moye, *Guardianship and Conservatorship*, in GRISSO, *supra* note 266, at 326.

270. Morse, *supra* note 266, at 539 n.19.

271. See, e.g., Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1772 (1992) (“The *parens patriae* power allows government to engage

a state's intervention should be to protect the defendant from decisions that stem from illness or disability rather than from those that are the product of the individual's free will.<sup>272</sup> Put simply, individuals capable of rational, autonomous decision making should not have to suffer the state's "protection" or the abdication of their ability to make choices. Requiring a demonstration that a functional disability stems from a mental disorder or disability should go far in restricting the application of the state's *parens patriae* power to its legitimate boundaries and "prevent the application of the incapacity standard to those whose decisions are merely eccentric or unpopular."<sup>273</sup> A court has other tools besides findings of incompetence to deal effectively with disruptive or obstreperous behavior that is the product of a defendant's conscious, rational will.<sup>274</sup> Requiring a causation component thus serves as an important safeguard of a defendant's autonomy and prevents excessive state paternalism.

Limiting findings of representational incompetence to cases involving mental illness or disability also respects the general tenet, applicable to other fundamental rights,<sup>275</sup> that the state should not deprive an individual of a fundamental right unless it uses the least restrictive means available to effectuate a compelling state interest.<sup>276</sup> Indeed, this principle arguably supplies the most compelling reason why impairments unrelated to mental illness should not provide a basis for precluding self-representation. If a person is capable of making rational decisions, a court should honor those decisions even if he requires assistance in executing them.<sup>277</sup> In the context of a guardianship determination, one court explained:

The capability to manage one's person does not resolve itself upon the question of whether the individual can accomplish tasks without assistance but rather whether that individual has the capability to take care

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in decisionmaking in the best interest of persons who by reason of age or disability are incapable of making such decisions for themselves.").

272. See Joel Feinberg, *Legal Paternalism*, 1 CAN. J. PHIL. 105, 115 (1971) (arguing that there must be "further evidence of derangement, or illness, or severe depression, or unsettling excitation" before an individual's actions may be deemed involuntary).

273. Anderer, *supra* note 268, at 6.

274. See *Illinois v. Allen*, 397 U.S. 337, 338 (1970).

275. See Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 229–30, 233 (2006) (observing that the Court does not apply strict scrutiny review to possible infringements of the Sixth Amendment but rather employs "categorical rules to 'implement'" Sixth Amendment rights including the right to counsel). Self-representation is a fundamental right. See *Martinez v. California*, 528 U.S. 152 (2000) (noting that "we found in *Faretta* that the right to defend oneself at trial is 'fundamental' in nature"); *Faretta v. California*, 422 U.S. 806, 817 (1975).

276. See *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) ("[A]ny classification which serves to penalize the exercise of [a constitutional] right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional."); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800–01 (2006).

277. See Moye, *supra* note 269, at 311–12; Anderer, *supra* note 268, at 7.



and intelligently direct that all his needs are met through whatever device is reasonably available under the circumstances.<sup>278</sup>

The principle of the least restrictive alternative also helps to define the types of mental disorders that supply the predicate for *Edwards*'s application, i.e., mental disorders that profoundly impair a person and are not susceptible to reasonable accommodation. Finally, the tenet illuminates why courts should often permit even individuals with serious mental illnesses to represent themselves.<sup>279</sup>

As previously discussed, most states have construed *Edwards* as carving out a limitation to *Faretta* that applies only to gray-area defendants suffering from a severe mental illness.<sup>280</sup> Critically, however, the meaning of the term "severe mental illness" is unclear. The defendant in *Edwards* had schizophrenia,<sup>281</sup> and presumably schizophrenia, at least when the disorder has been experienced for a certain duration and has resulted in a certain level of functional impairment, qualifies as a severe mental illness. The status of other mental illnesses, however, particularly those that do not carry symptoms of psychosis, is uncertain.<sup>282</sup> In particular, it is unclear whether personality disorders can ever qualify as severe mental illnesses. Most courts that have addressed the question have held that they do not, but their findings on this issue are muddled or have been limited to the specific diagnoses before them.<sup>283</sup> Therefore, it is currently difficult to discern, in

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278. *In re McPeak's Estate*, 368 N.E.2d 957, 960 (Ill. App. 1977). *See also infra* note 304 (listing cases that construe the Due Process Clause to limit the scope of a guardian's decision making powers to a ward's incompetence).

279. The thoughts of Chris Slobogin substantially enriched this paragraph.

280. *See supra* notes 48–49, 124–25 and accompanying text.

281. *Indiana v. Edwards*, 554 U.S. 164, 169, 177–78 (2008).

282. *See, e.g., People v. Scott*, No. 1-11-2267, 2013 Ill. App. LEXIS 2071, at \*6 (Ill. App. Ct. Sept. 16, 2013) ("Those cases relying on *Edwards* that have found that defendant was properly denied the right to proceed pro se, involved defendants who were diagnosed with schizophrenia and refused to take medication, or who suffered from a severe mental illness with paranoid ideation. Here, there is no indication that defendant was diagnosed with a mental illness and the report entered on his fitness to stand trial shows that he was not prescribed psychotropic medication." (citation omitted)); *State v. Scott*, No. 2014-KA-0599, 2015 WL 1880509, \*7 (La. Ct. App. Apr. 22, 2015) (stressing the absence of a psychotic disorder when finding that the defendant did not have a major or significant mental illness). Notably, however, other mental disorders, such as anxiety-related disorders, can significantly impair one's capacity to sustain ongoing decision making at trial or perform other essential functions. Several state courts have struggled over whether certain mental disorders qualify as "severe mental illnesses," but I have been unable to locate any opinion that defines "severe mental illness" or significantly illuminates its contours. *See, e.g., State v. McCullah*, 797 N.W.2d 131 (Iowa Ct. App. 2010) (anxiety, attention deficit hyperactivity disorder, and antisocial personality disorder); *State v. Jason*, 779 N.W.2d 66, 76 n.2 (Iowa Ct. App. 2009) (Asperger's syndrome).

283. *See, e.g., Falcone v. State*, 227 P.3d 469, 470–73 (Alaska Ct. App. 2010) (acknowledging that antisocial personality disorder and polysubstance dependence were not serious mental illnesses, but refusing to limit representational incompetence to individuals with serious mental illness); *McCullah*, 829 N.W.2d 131 (affirming the trial court's decision that antisocial personality disorder does not constitute a severe mental illness); *see also United States v. McKinney*, 737 F.3d 773, 778–79 (D.C. Cir. 2013).

advance of a court's ruling on the issue, whether a particular diagnosis may supply a possible predicate for representational incompetence.<sup>284</sup>

### B. Disordered Speech

The values animating representational competence and the Court's language in *Edwards* and *McKaskle* converge to support the conclusion that disordered speech may, so long as it stems from a severe mental illness and reflects significant cognitive impairment,<sup>285</sup> provide a valid basis for denying self-representation.<sup>286</sup> The Court in *McKaskle* established that the "core" of the self-representation right is the right to control one's defense,<sup>287</sup> a right that necessarily depends on an individual's autonomy and ability to make self-interested decisions.<sup>288</sup> Disordered speech, often

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284. The definition that a court *should* adopt for "severe mental illness" is also unclear. A range of choices that vary in diagnosis, durational component, and level of disability are possible. See, e.g., John J. Spollen III, M.D., *Perspectives in Serious Mental Illness*, MEDSCAPE PSYCHIATRY (May 20, 2003), [http://www.medscape.com/viewarticle/455449#vp\\_1](http://www.medscape.com/viewarticle/455449#vp_1) ("[T]he most consistent definitions of [Serious and Persistent Mental Illness] include a diagnosis of nonorganic psychosis, functional disability in areas of social and occupational functioning, and a prolonged illness and long-term treatment. It includes many patients with schizophrenia, but also people with bipolar disorder, severe major depression, and, in some less frequently used definitions of [Serious and Persistent Mental Illness], substance use and personality disorders.") [<https://perma.cc/YTB5-JPC5>]; Arie P. Schinnar et al., *An Empirical Literature Review of Definitions of Severe and Persistent Mental Illness*, 147 AM. J. PSYCHIATRY 1602 (1990) (comparing seventeen definitions of severe and persistent mental illness used in the United States between 1972 and 1987, and concluding that the definition with the greatest consensus, and most representative of the middle range of prevalence, was the 1987 definition forged by the National Institute of Mental Health); NAT'L INST. OF MENTAL HEALTH, TOWARDS A MODEL FOR COMPREHENSIVE COMMUNITY-BASED MENTAL HEALTH SYSTEM 14–16 (1987); Mirella Ruggeri et al., *Definition and Prevalence of Severe and Persistent Mental Illness*, 177 BRIT. J. PSYCHIATRY 149, 149 (2000) (explaining that the 1987 National Institute of Mental Health definition of severe mental illness involves a diagnosis of nonorganic psychosis or personality disorder; a durational component of "prolonged illness and long-term treatment" that has been operationalized as requiring at least two years of mental illness or treatment; and a certain level of disability, characterized as including at least three of eight specified criteria); *Health Care Reform for American with Severe Mental Illnesses: Report of the National Advisory Mental Health Council*, 150 AM. J. PSYCHIATRY 1447, 1448 (1993) (citing *Mental Illness in America: A Series of Public Hearings Before the S. Comm. On Appropriations*, 103d Cong. 45 (2003)) ("Severe mental illness is defined through diagnosis, disability, and duration, and includes disorders with psychotic symptoms such as schizophrenia, schizoaffective disorder, manic depressive disorder, autism, as well as severe forms of other disorders such as major depression, panic disorder, and obsessive compulsive disorder.").

285. See *supra* Part III.A.

286. See *Edwards*, 554 U.S. at 176 (emphasizing that "[d]isorganized thinking [and] impaired expressive abilities . . . can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant" (quoting Brief for Am. Psychiatric Ass'n et al. as Amici Curiae, *supra* note 32, at 26)).

287. *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984).

288. See, e.g., Luban, *supra* note 180, at 465 ("[R]ationality . . . is the embodiment of autonomy, in the double sense that without it we will fritter away our capacity for future autonomy, and that irrationality is a symptom of forfeited autonomy. . . . An irrational individual . . . cannot be said to be choosing his or her actions."); Feinberg, *supra* note 272,

the best evidence of disordered thinking,<sup>289</sup> may suggest impaired cognitive processes and, possibly, a diminished ability to recognize and advance one's best interests. To the extent that a defendant's statements or decisions are untethered from a reasoned thought process, they do not reflect a meaningful expression of autonomy and do not warrant deference. In this situation, a defendant is neither competent to control, nor conduct, his defense. Thus, adequate grounds for a paternalistic intervention exist, and a court is warranted in appointing counsel to usurp the defendant's decision-making authority and assume control over his defense.<sup>290</sup>

For this conclusion to apply, however, disordered speech must truly be "disordered" and must reflect, or coexist with, serious cognitive impairment. The DSM-5 recognizes that "mildly disorganized speech is common and nonspecific"; therefore, symptoms of disordered speech—whether involving tangentiality, loose associations, derailment, or incoherence—must be severe enough to "substantially impair effective communication."<sup>291</sup> Many pro se defendants are relatively uneducated, have poor literacy, and are unversed in the law.<sup>292</sup> Their oral and written communications are likely to be disjointed, tangential, and poorly worded; they may even be irrelevant or unsupported by the law.<sup>293</sup> Before withholding a defendant's right to control his defense on grounds of poorly drafted pleadings or unartful exchanges with the court, the court should make a finding that the defendant's speech rises to the level of disordered, results from a severe mental illness, and either demonstrates or coexists with serious cognitive impairments that call into question his ability to

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at 111–12 (discussing rationality and self-interest as necessary predicates for voluntary or nearly voluntary decisions).

289. See *supra* note 132 and accompanying text (quoting the DSM-5).

290. See Luban, *supra* note 180, at 465 (endorsing Thompson's three conditions for a paternalistic intervention); Dennis F. Thompson, *Paternalism in Medicine, Law, and Public Policy*, in *ETHICS TEACHING IN HIGHER EDUCATION* 246, 250–51 (D. Callahan & S. Bok eds., 1980) (expressing three conditions for paternalism: "[f]irst, the decision of the person who is to be constrained must be *impaired*; . . . [s]econd, the restriction is as *limited* as possible[;] . . . [f]inally, the restriction prevents a serious and irreversible *harm*"). Indeed, such a defendant may be incompetent to proceed, and a court should consider reevaluating his competence to stand trial at this point.

291. DSM-5, *supra* note 128, at 88.

292. See, e.g., *People v. Thomas*, No. F063867, 2013 WL 5652504, at \*6 (Cal. Ct. App. Oct. 17, 2013) (pro se defendant had not completed high school and admitted to reading below an eleventh-grade level); *State v. Bell*, 53 So.3d 437, 450, 457 (La. 2010) (pro se defendant read at second-grade level according to psychiatric evaluation); *State v. Lane*, 707 S.E.2d 210, 216 (N.C. 2011) (trial court found "[pro se] defendant's 'literacy level at best would be found to be at the third grade level,' but is 'probably or more likely in the range of kindergarten through the second grade'").

293. See, e.g., *People v. Koontz*, 46 P.3d 335, 356 (Cal. 2002) (noting that the pro se defendant had "a proclivity to boast or exaggerate, a tendency to digress in argument, a shaky grasp of the legal concept of relevancy, and even a certain tangentiality in speech patterns"); *People v. Foster*, No. A134210, 2013 WL 5503153, at \*6 (Cal. Ct. App. Oct. 4, 2013) (pro se defendant's conduct during opening statement included irrelevant statements and exhibited unfamiliarity with the law); *People v. Miranda*, No. B256806, 2015 WL 2255077, at \*6 (Cal. Ct. App. May 13, 2015) (pro se defendant was often "inarticulate and ineffective").

identify and advance his best interests.<sup>294</sup> This procedure would demonstrate due regard for the dignity and autonomy of the defendant, the dictates of *Faretta*, and the parameters of *Edwards*.

*C. Inability to Be Understood by Courtroom Actors*

On the other hand, denying the right to control one's defense on the basis of speech unintelligible to courtroom actors is often unnecessary and insufficiently respectful of a defendant's autonomy and constitutional right to self-representation. As discussed in Part I.D.2, a number of impediments can result in incomprehensible speech. These conditions include speech impediments, tic disorders, Parkinson's disease, soft speech, and a thick foreign accent.<sup>295</sup> Impairments in this category often will not reflect any cognitive deficits, even when they stem from a mental illness.<sup>296</sup>

A judge can often remedy communication problems of this sort by appointing a professional to translate or execute the decisions of the defendant.<sup>297</sup> If the individual merely has a strong foreign accent that impedes understanding by courtroom actors, the court should appoint an interpreter. Indeed, such an individual may have a due process right to an interpreter to effectuate his right to self-representation, just as he may to carry out his rights to testify and cross-examine hostile witnesses and to ensure the provision of a fair trial.<sup>298</sup>

If an individual suffers from an impediment that allows him to communicate with counsel but inhibits effective oral communication with courtroom actors, then the court should consider appointing hybrid counsel to execute the defendant's decisions, assuming they are competently

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294. To the extent that a defendant's communications are intelligible to hybrid counsel but unintelligible to a court, jury, or witnesses (and do not reflect serious cognitive impairment), the discussion in Part III.C is applicable. In particular, a court should honor a defendant's decisions to the extent that he does not have serious deficits in thinking, reasoning, or problem solving and can communicate his decisions to a functionary of the court at, or perhaps before, trial. If he is unable to communicate them in an intelligible fashion to witnesses or the trier of fact, a court should authorize hybrid counsel to carry out his defense consistently with his instructions.

295. See *supra* Part I.D.2.

296. For instance, tic disorders, such as Tourette's disorder or persistent vocal tic disorder, are recognized mental disorders but are not associated with cognitive impairments. See DSM-5, *supra* note 128, at 81–82 (detailing diagnostic criteria and features of tic disorders). The same may be true for childhood-onset fluency disorder (stuttering). See *id.* at 45–46 (detailing diagnostic criteria and features of childhood-onset fluency disorder).

297. See *United States v. McDowell*, 814 F.2d 245, 250 n.2 (6th Cir. 1987) (“Any limitations due to physical or educational impairments that do not affect the ability of the accused to choose self-representation over counsel can probably be overcome, if necessary, through the use of stand-by counsel or interpreters. Such aids may be provided even over the objection of the accused.”).

298. See, e.g., *United States v. Mayans*, 17 F.3d 1174, 1181 (9th Cir. 1994) (discussing the right to testify); *United States v. Lim*, 794 F.2d 469, 470 (9th Cir. 1986) (*per curiam*) (collecting cases); *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973); *United States ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970) (discussing due process).

made.<sup>299</sup> Because the defendant's competence to stand trial is not at issue, his powers of communication will necessarily allow him to communicate effectively with appointed counsel.<sup>300</sup> The extent to which satisfaction of *Dusky's* communication requirement permits a defendant to communicate adequately with hybrid counsel during the course of trial is an unknown empirical matter. The answer likely depends on the timing, frequency, and content of communications about strategic and tactical decisions.<sup>301</sup> It is possible that a defendant's communicative abilities could suffice for relay of key details about an alleged criminal incident for purposes of competence to stand trial, for instance, but be inadequate to express trial decisions because the latter communications require more nuance or conveyance in a shorter time frame. To the extent this is the case, the portion of the discussion in Part III.D pertaining to impairments affecting a defendant's ability to communicate in a timely fashion with hybrid counsel is applicable.

The Court's fracturing of the self-representation right into control and performance aspects in *McKaskle* supports the use of hybrid counsel to compensate for a defendant's communicative problems.<sup>302</sup> This differentiation also reflects the reality that denying self-representation on competence grounds can involve two distinct paternalistic interventions: denial of a right to control one's defense and denial of a right to execute it. A paternalist intervention is justified only to the extent that constraints on an individual's liberty are as limited as possible.<sup>303</sup> When a defendant lacks the ability to make sound decisions, the state is justified in appointing counsel to exercise surrogate decision making and both to control and conduct the defense. On the other hand, when an individual lacks sufficient ability to conduct his defense—but possesses all cognitive abilities necessary to reach sound defense decisions—the state is only justified in denying his participation right. Because the defendant is of sound mind, no justification exists for usurping his decision-making authority. In this

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299. See Johnston, *supra* note 4, at 582–83 (suggesting that “a pro se defendant with a communication-related deficiency should have a due process right to standby counsel or some other agent to effectuate his decisions in order to honor his constitutional right to self-representation”); see also *supra* note 298 and accompanying text; cf. Savage v. Estelle, 924 F.2d 1459, 1466 (9th Cir. 1990) (noting that the defendant “has not asked for and would clearly not benefit” from the assistance of “a sign language interpreter, or some other mechanical or non-mechanical means of rapid communication”); *id.* at 1464 n.11 (observing that “the trial court attempted to ensure that Savage’s right to represent himself was denied only to the extent that his physical characteristics rendered him unable to present his own defense” and that the defendant was permitted to file motions pro se and to ask questions to witnesses through appointed cocounsel).

300. See *supra* note 26 (defining the *Dusky* standard of competence to stand trial).

301. For instance, if a pro se defendant need only communicate key strategic and tactical decisions to standby counsel prior to trial, then he may not need greater communication abilities than *Dusky* requires.

302. See *McKaskle v. Wiggins*, 465 U.S. 168, 174, 176–77 (1984).

303. See Luban, *supra* note 180, at 465 (endorsing the notion that “the constraints imposed on an individual’s liberty must be as limited and temporary as possible”); Thompson, *supra* note 290, at 251.

situation, the state should appoint hybrid counsel to execute the pro se defendant's strategic and tactical decisions.<sup>304</sup>

Indeed, *McKaskle* suggests that a trial court could order standby counsel to assume greater participation in cases in which a pro se defendant lacks certain communication skills. The Court highlighted the important role that standby counsel can play in allowing a defendant to overcome performance-related obstacles. In an introductory paragraph, *McKaskle* extended *Faretta* by construing the latter as holding that "an accused has a Sixth Amendment right to conduct his own defense, provided only that he knowingly and intelligently forgoes his right to counsel and that he is *able and willing* to abide by rules of procedure and courtroom protocol."<sup>305</sup> Subsequent cases have applied this language to preclude self-representation for defendants with communication-related difficulties such as stuttering or speaking with a strong foreign accent.<sup>306</sup> Later in *McKaskle*, the Court noted that a trial court could appoint standby counsel, even over a defendant's objection, to ensure his compliance with basic rules of courtroom protocol and procedure.<sup>307</sup> The Court also held that standby counsel could usefully "assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals."<sup>308</sup> Read together, these passages indicate that a trial court should make separate assessments of a defendant's decision-making and performance abilities and, when a defendant cannot communicate effectively at trial, should appoint hybrid counsel to enable the exercise of the defendant's "core" *Faretta* right of controlling his defense.<sup>309</sup>

Notably, the *McKaskle* Court mentioned in dicta that a defendant does not have a right to hybrid counsel or to "choreograph special appearances

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304. Indeed, extrapolating from guardianship cases holding that due process requires courts to confine guardians' decision-making powers to those areas in which a ward suffers from incapacity, one could argue that a defendant has a Sixth Amendment or due process right to the assistance of hybrid counsel to execute those decisions that the defendant can competently make but not execute himself. See, e.g., *Guardianship of Hedin v. Gonzales*, 528 N.W.2d 567 (Iowa 1995); *In re Boyer*, 636 P.2d 1085 (Utah 1981); *In re Guardianship of Dameris L.*, 956 N.Y.S.2d 848 (Sur. Ct. 2012).

305. *McKaskle*, 465 U.S. at 173 (emphasis added). In *Faretta v. California*, the Court held that "the trial judge may terminate self-representation by a defendant who *deliberately engages* in serious and obstructionist misconduct" because "[t]he right of self-representation is not a license to abuse the dignity of the courtroom [nor . . . ] to comply with relevant rules of procedural and substantive law." 422 U.S. 806, 834 n.46 (1975) (emphasis added). Because this construal took place with no discussion, the requirement that an individual be "able" to abide by rules of procedure and protocol appears to be an inadvertent expansion of *Faretta*. To the extent that the Court in fact extended *Faretta*, this portion of the Court's decision in *McKaskle* is dicta.

306. *Rodriguez v. Castro*, 116 F. App'x 865, 867 (9th Cir. 2004) (discussing strong foreign accent); see *Savage v. Estelle*, 924 F.2d 1459, 1460, 1464 (9th Cir. 1991) (discussing stuttering).

307. *McKaskle*, 465 U.S. at 183.

308. *Id.* at 184. The Court observed that such participation by counsel would present no "significant interference with the defendant's actual control over the presentation of his defense." *Id.* at 183.

309. See *infra* Part III.F.

by counsel.”<sup>310</sup> Citing this statement, courts across the country have found that no right to hybrid counsel exists for a pro se defendant.<sup>311</sup> If that were the case, then a greater communicative or performance threshold may be warranted in a representational competence standard to prevent unreliable adjudications.<sup>312</sup> However, the Supreme Court has never determined the scope of the pro se right for a defendant with sufficient cognitive abilities but inadequate communicative abilities to execute his defense, so the question is an open one. In light of the predominant value of autonomy endorsed by *Faretta* and the normative analysis offered above—as well as the *McKaskle* Court’s differentiation of control and performance and its sanctioning of standby counsel to ensure compliance with courtroom procedure—a credible argument exists that such a pro se defendant would have a Sixth Amendment or due process right to this assistance. Quite simply, if a defendant possesses intact decision-making abilities, a decision to usurp his ability to make defense decisions and deprive him of a constitutional right cannot be justified. Therefore, to prevent a miscarriage of justice, a defendant should have a right to assistance in executing his strategic and tactical choices.

#### *D. Inability to Communicate in a Timely Fashion*

Normative concerns, *Edwards*, and *McKaskle* also suggest that the third category of impairments—those inhibiting timely communication within the context of trial—may support a finding of representational incompetence so long as those impairments derive from a severe mental illness.<sup>313</sup> This determination turns on whether a defendant possesses the ability to effectively communicate timely decisions to hybrid counsel.

Impairments that impede timely communication—including, among others, slowed speech, lengthy pauses, and a need for frequent clarification—may exist independent of significant deficits in thinking, reasoning, or judgment.<sup>314</sup> When this is the case, a defendant may be able to reach competent decisions but be unable to verbalize them in a sufficient

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310. *McKaskle*, 465 U.S. at 183.

311. See Colquitt, *supra* note 18, at 76–77, 97 n.246.

312. Several commentators have suggested a representational competence standard with such a communicative element. See Felthous, *supra* note 4, at 474 (arguing that competency to waive counsel should include “competency to make and argue one’s own case in the courtroom; more explicitly, defendant should be able to formulate and present his own defense with appropriate awareness of courtroom proceedings and decorum; and he should be capable of cooperating with the judge and other functionaries of the court”); Felthous & Flynn, *supra* note 34, at 16 (clarifying this standard in the context of the trial tasks enumerated in *McKaskle*); Marks, *supra* note 4, at 846 (“With regard to interaction and communication, instead of the ability to ‘consult with his lawyer,’ the self-representing defendant needs the capacity to communicate defense arguments and positions coherently to the court and jury and to question witnesses and prospective jurors in a manner that might reasonably elicit relevant information.”).

313. See *supra* Part III.A.

314. Cf. *supra* note 142 (detailing some of the cognitive, affective, and behavioral impairments that can impair a defendant’s ability to make or execute decisions in a short timeframe).

time or manner to participate effectively within the context of trial. As examined more fully in the previous section, when such a defendant can communicate decisions in a timely manner to hybrid counsel, hybrid counsel should operate under a duty to execute those decisions.<sup>315</sup>

However, if a defendant lacks the ability to convey effectively his wishes to hybrid counsel, a court should deny self-representation and authorize counsel both to control and conduct trial tactics, assuming the defendant is competent to stand trial.<sup>316</sup> In this instance, respect for the autonomy of the defendant should lead courts, as a matter of discretion and consistent with a client-oriented model of representation, to encourage attorneys to honor decisions of great personal significance to the defendant that can be made competently prior to trial.<sup>317</sup> Decisions of high personal value may include selection of the defense and potentially which witnesses to call.<sup>318</sup> If decisions of such a nature are at issue in a given case, the court should encourage counsel to respect the defendant's decisions on those issues.<sup>319</sup> If new information arises at trial that casts the wisdom of a prior decision into doubt, counsel could request a brief continuance to discuss the issue with the defendant. Allowing such a gray-area defendant to make decisions of strong personal significance prior to trial could pose efficiency and practicality issues for trial management, but such a stance would be most respectful to a defendant's autonomy, should not pose a significant threat to the fairness or accuracy of a proceeding, and would reduce the sting of the denial of the pro se right.<sup>320</sup>

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315. See *supra* notes 302–09 and accompanying text.

316. See *supra* note 26 (listing *Dusky*'s components of the competence to stand trial standard, which include a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding"). If a defendant is incapable of communicating in a timely manner with hybrid counsel at trial, he may or may not meet the minimum standard of ability to communicate with counsel necessary for satisfaction of the *Dusky* standard. See *supra* notes 300–01 and accompanying text.

317. See Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990) (evaluating the benefits and disadvantages of client-centered counseling); Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369 (2006) (exploring the relationship between client-centered representation and autonomy theory, and proposing a taxonomy of client-centered lawyering approaches). I am grateful to Richard Bonnie for calling my attention to the relationship between hybrid counsel and an enhanced client-control model of representation.

318. Johnston, *supra* note 4, at 586. Richard Bonnie has identified certain strategic and tactical decisions that may be of particular import to criminal defendants. See Bonnie, *supra* note 52, at 569 & n.110.

319. See Johnston, *supra* note 4, at 586–87.

320. Cf. *Major v. Commonwealth*, 275 S.W.3d 706, 718, 722 (Ky. 2009) (approving a trial court's permitting a defendant who lacked an ability to process information quickly to direct examinations through prepared questions but authorizing hybrid counsel to perform other aspects of the defense). The Kentucky constitution grants criminal defendants the right to proceed with the assistance of hybrid counsel. *Id.* at 718.



*E. Suboptimal Advocacy*

Defendant characteristics that diminish the likely effectiveness of a defense—such as low educational attainment, low reading fluency,<sup>321</sup> lack of familiarity with criminal law or procedure,<sup>322</sup> or a mere tendency to ramble, interrupt, or ask repetitive questions of a witness<sup>323</sup>—generally should not support a finding of representational incompetence.<sup>324</sup> First, to the extent that these conditions do not flow directly from severe mental illness, a court would not be able to satisfy the causation requirement of *Edwards*.<sup>325</sup> Second, and more fundamentally, these conditions affect the likely success of a pro se defendant's advocacy; they do not constitute functional deficits that undermine a defendant's autonomy or pose a grave threat to the reliability or the actual or apparent fairness of an adjudication.

None of these conditions necessarily reflect cognitive deficits suggesting an absence of meaningful autonomy. It is possible that such a relationship could exist; however, independent evidence (such as a psychological or psychiatric examination, medical records, or psychological or intellectual testing) should establish such deficits, and a court should rest its denial of the right to control one's defense on those grounds. It is not unusual for an individual with adequate cognitive abilities to have poor literacy or low educational attainment; this is an unfortunate result of our social policies and lingering issues of economic and racial injustice.<sup>326</sup> Moreover, the average layperson is likely unfamiliar with the intricacies of criminal law, procedure, and trial practice, and his execution of trial tasks such as witness examination, therefore, likely will be unartful.

For a defendant's characteristic to pose a "grave threat" to the accuracy or fairness of an adjudication, that characteristic should be at least somewhat rare or substantially more serious than the norm.<sup>327</sup> Otherwise, the constitutional right of self-representation would be foreclosed from the average resident of the United States and would be reserved to the privileged few. The Supreme Court in *Faretta* anticipated that a layperson's self-representation would often be ineffective, yet held that the value of autonomy trumped concerns of accuracy or apparent fairness. The Court further observed that "the help of a lawyer is [generally] essential to

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321. To the extent that a defendant lacks the ability to communicate intelligibly with courtroom actors, but can communicate with hybrid counsel, the discussion in Part III.D is applicable.

322. See *State v. Imani*, 786 N.W.2d 40, 54 (Wis. 2010); *Pickens v. State*, 292 N.W.2d 601, 611 (Wis. 1980); *State v. Jackson*, 867 N.W.2d 814, 818–19, 824 (Wis. Ct. App. 2015).

323. See *Chadwick v. State*, 309 S.W.3d 558, 562 (Tex. Crim. App. 2010); *In re J.G.*, No. 04-13-00825-CV, 2014 WL 4627599, at \*3–4 (Tex. App. Sept. 17, 2014).

324. See Marks, *supra* note 4, at 846–47.

325. See *supra* note 265.

326. See FREDERICK J. MORRISON ET AL., IMPROVING LITERACY IN AMERICA 3–7 (2005) (examining poor literacy rates in the United States, and attributing those rates to a wide variety of factors, including parenting, preschool environment, socioeconomic forces, and race/ethnicity).

327. See *supra* note 204 and accompanying text.

assure the defendant a fair trial.”<sup>328</sup> The Court detailed the many pitfalls that await pro se defendants: an inability to spot fatal deficiencies in the pleadings, unfamiliarity with rules of evidence, inadequate trial skills, and lack of knowledge of relevant substantive law.<sup>329</sup> The Court observed that “the ignorant and illiterate, [and] those of feeble intellect,” will be even less likely to succeed at trial pro se than laypeople with intelligence and education.<sup>330</sup> Yet this general reality—to which the Court again alluded in *McKaskle* and *Martinez v. California*<sup>331</sup>—did not detract from the natural right of an individual, if he so chooses, to control his defense.<sup>332</sup>

*F. Implications for State Representational  
Competence Standards and Model Approach*

The above analysis demonstrates that only a subset of communication impairments sufficiently imperil a defendant’s autonomy or the accuracy or fairness of an adjudication to justify a finding of representational incompetence. To better cohere with the normative underpinnings of representational competence and Supreme Court case law, states should revise their competency standards and procedures in several key ways.

First, states should recognize that *Edwards*’s competence limitation to self-representation is limited to defendants who have a severe mental illness. In addition, to ensure that the state’s paternalistic intervention and denial of a constitutional right are justified—and do not extend to merely odd forms of thinking or speech—a court should require that any cognizable impairment or condition actually stem from that severe mental illness. Courts must define the currently ambiguous term “severe mental illness” to impart predictability and clarity to the law.<sup>333</sup>

Second, following the *McKaskle* Court’s recognition of self-representation as a bundle of rights, courts should assess a defendant’s competence to control his defense separately from his competence to conduct it. This dual inquiry is necessary to justify the content and scope of the state’s paternalist intervention.<sup>334</sup> When a defendant’s decision-making abilities are intact, denying the defendant’s constitutional right to control his defense—and transferring his authority over defense decisions to an unwanted attorney—is unwarranted and unjustifiable. Therefore, states adopting heightened representational competence standards after *Edwards* should adopt and articulate separate competency standards for the right to control one’s defense and the right to conduct it.

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328. *Faretta v. California*, 422 U.S. 806, 832 (1975); *see also id.* at 834.

329. *Id.* at 833 n.43.

330. *Id.*

331. 528 U.S. 152 (2000).

332. *See Faretta*, 422 U.S. at 834.

333. *See supra* notes 280–84.

334. *See supra* note 290.

Competency to control one's defense should center on problem-solving abilities.<sup>335</sup> Only when a defendant lacks an ability requisite to decision making or problem solving may a court justify authorizing an unwanted third party to make decisions on behalf of the defendant. As I have argued elsewhere, psychological theories of problem solving suggest that pro se defendants should possess a range of cognitive, behavioral, and affective abilities necessary for sound decision making.<sup>336</sup> These include the foundational abilities to perceive problematic situations,<sup>337</sup> generate alternative courses of action,<sup>338</sup> and maintain mental organization.<sup>339</sup> Additionally, a defendant should possess the ability to identify a plausible source of the prosecution,<sup>340</sup> an ability to gather information to evaluate the state's case,<sup>341</sup> a willingness to attend to the prosecution,<sup>342</sup> and an ability to withstand the stress of trial.<sup>343</sup> For certain critical strategic decisions, such as selecting the defense to pursue at trial, a defendant should be capable of justifying the decision with a plausible reason.<sup>344</sup> Finally, a defendant should be capable of conveying his choices to a functionary of the court, such as hybrid counsel.<sup>345</sup> So long as a pro se defendant possesses these capacities, his self-representation should reflect sufficient deference to the important principle of autonomy and satisfy minimal requirements of reliability and fairness.<sup>346</sup> A separate article details the underpinnings and nuances of this position as well as the various abilities involved.<sup>347</sup>

If a court finds a defendant incompetent to control his defense,<sup>348</sup> it should deny his pro se request and appoint counsel to represent him. In this

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335. As detailed above, disordered speech could support a finding of incompetence to control one's defense to the extent that it reflects or coexists with cognitive deficits that implicate a defendant's ability to exercise meaningful autonomy.

336. For a detailed evaluation of each component of social problem-solving theory, and its import for self-representation, see Johnston, *supra* note 4, at 546–92. Several of the abilities listed below overlap with those identified by Professor Richard Bonnie as critical to adjudicative competence, including the capabilities to understand one's legal situation, appreciate one's jeopardy, recognize relevant information, and communicate that information to counsel. See Bonnie, *supra* note 52, at 551–52, 561.

337. See Johnston, *supra* note 4, at 546–53.

338. See *id.* at 557–61.

339. See *id.* at 585.

340. See *id.* at 548.

341. See *id.* at 554–55.

342. See *id.* at 546–53.

343. See *id.* at 585–86.

344. See *id.* at 566–81.

345. See *id.* at 587. As discussed in Part III.D, a defendant may be unable to communicate adequately with counsel if he suffers from an impairment that impedes timely communication such as a need for frequent clarification.

346. See *id.* at 532–41.

347. See generally *id.*

348. A finding of representational incompetence could be based on a determination that the defendant's mental condition is likely to deteriorate such that he will be unable to engage in ongoing decision making throughout the course of the proceeding. See *supra* text accompanying notes 342, 346 (arguing that representative competence should include the abilities to maintain mental organization and withstand the stress of trial). For these

case, the defendant's decisional deficits would justify the state's paternalism, and the court should authorize counsel to make defense decisions on the defendant's behalf.<sup>349</sup> Alternatively, if the defendant is competent to control his defense, but the court harbors concerns about the defendant's ability to execute it to a minimal degree, the court may then assess his competence to conduct his defense. This two-tiered approach, though not explicitly endorsed by the Supreme Court, is consistent with *Edwards*, *Faretta*, and *McKaskle* and would serve the goal of avoiding grossly unfair or inaccurate results while not unduly trammeling the defendant's autonomy.<sup>350</sup>

While formulations could vary, a possible competency standard for the execution of a defense could assess a defendant's ability to communicate in a coherent manner with courtroom actors in the context of trial. Indeed, this articulation resembles the communicative representational competence standards adopted in six of the seven states profiled above.<sup>351</sup> If a defendant, although sufficiently autonomous to control his defense, lacks the ability to communicate coherently with courtroom actors, a court should honor his right to control his defense but, to the extent warranted, deny his ability to perform it. As explored above, this could be the case when a defendant has a speech impediment, a tic disorder, Parkinson's disease, soft speech, or a thick foreign accent. It may also be the case when the defendant interposes long pauses before speaking or speaks intolerably slowly. In these situations, the court should appoint a professional—such as an interpreter or hybrid counsel—to execute the decisions of the mentally competent defendant on significant strategic and tactical matters that the defendant cannot communicate himself.<sup>352</sup>

Finally, no state should deny self-representation on the basis of characteristics that simply diminish the likely effectiveness of a defense, such as low educational attainment, low reading fluency, lack of familiarity with criminal law or procedure, or a mere tendency to ramble, interrupt, or ask repetitive questions of a witness. Many of these conditions do not flow directly from severe mental illness; moreover, they do not constitute functional deficits that undermine a defendant's autonomy or pose a grave

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defendants—who may be competent to render reasoned decisions at the moment of a competency examination but who are denied their pro se right because of an anticipated inability to maintain mental organization or withstand the stress of trial—a model of client-centered lawyering may be particularly attractive. *See, e.g., supra* notes 317–20.

349. Of course a defendant will retain the right to make the few “fundamental” decisions allocated to the defendant. *See Johnston, supra* note 4, at 536–37, 337 nn.89–93.

350. *See Indiana v. Edwards*, 554 U.S. 164, 176–77 (2008) (listing the values implicated by self-representation by a gray-area defendant).

351. *See* WYO. STAT. ANN. § 7-11-302 (West 2014); *Falcone v. State*, 227 P.3d 469, 474 (Alaska Ct. App. 2010); *People v. Johnson*, 267 P.3d 1125, 1132 (Cal. 2012); *State v. Connor*, 973 A.2d 627, 657 (Conn. 2009); *State v. Jason*, 779 N.W.2d 66, 76 n.2 (Iowa Ct. App. 2009); *Edwards v. State*, 902 N.E.2d 821, 829 (Ind. 2009), *remanded from* 554 U.S. 164 (2008); *supra* Part I.C.

352. *See McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984) (stating that “the pro se defendant is entitled to preserve actual control over the case he chooses to present to the jury” including over all significant strategic and tactical decisions).

threat to the reliability or fairness of an adjudication. Rather, the Supreme Court in *Faretta* anticipated these characteristics and deemed their likely effect on the accuracy of an adjudication to be subordinate to the defendant's autonomy interest in controlling his defense. Thus, representational competence standards such as Wisconsin's—which assess whether a defendant is capable of “effective communication” and of offering “a meaningful defense” by considering his education, literacy, fluency in English, and “any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury”<sup>353</sup>—should be abrogated, as they are likely to be unconstitutional as applied.

#### CONCLUSION

Following *Indiana v. Edwards*, states have adopted various standards for evaluating a defendant's representational competence. Seven of these standards include an express communication component, but twenty others are so vague that they could easily factor a defendant's expressive abilities into their calculus. Close analysis of relevant Supreme Court precedent reveals that only impairments that demonstrate an absence of meaningful autonomy or that pose a grave threat to the reliability or fairness of an adjudication should provide a basis for a denial of self-representation on competency grounds. Moreover, the case of *McKaskle v. Wiggins* indicates that courts should comprehend self-representation as a bundle of distinct rights of control and performance, thus suggesting that states should adopt separate competency standards to control and conduct a defense. This Article assesses the constitutional significance of four types of communication impairments for self-representation and suggests revisions to existing representational competence standards. It also proposes a two-pronged representational competence standard that should withstand constitutional scrutiny.

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353. See *Pickens v. State*, 292 N.W.2d 601, 611 (Wis. 1980); see also *State v. Imani*, 786 N.W.2d 40, 53–54 (Wis. 2010).